39173

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JACOB TWARDZIK et al., (Relators) Appellants,

vs.

FRANCIS X. SWIETLIK et al., (Respondents) Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 609[1]

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. Relators (originally two, now seven) by their amended and additional petitions, filed an information in the nature of a quo warranto, whereby they seek to question the title of the respondents (thirty-four in number), who claim to be and are acting as officers, directors and commissioners of the Polish National Alliance of North America, a fraternal insurance corporation organized under the laws of Illinois December 7, 1880, under the name of the United Polish National Benevolent Society. March 30, 1896, the Alliance qualified under the act concerning the organization of fraternal beneficiary societies, and in force June 22, 1893, and amended by the act approved June 21, 1895, in force July 1, 1895. (See Session Laws of 1893, page 130; Laws of 1895, pages 178-80; Ill. State Bar Stats. 1935, chap. 73, pages 1921-26, secs. 1 to 14.)

October 14, 1935, an order was entered in the Superior court granting leave to the State's Attorney to file an information. January 3, 1936, the order of October 14th was vacated and leave given to file an amended petition, which was filed March 14, 1936. A rule to show cause was entered, which respondents answered. June 23, 1936, the additional petition was filed, and on the same date the court, considering the cause upon the pleadings with exhibits thereto attached, held the same insufficient to warrant the filing of an information, entered an order dismissing the petitions

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at the cost of the relators. From that judgment the relators have perfected this appeal.

Respondents claim title by reason of their election at the 27th convention of the Alliance, which was held in Baltimore, Maryland, from September 16, 1935, to September 23, 1935. The charter, constitution and by-laws of the Alliance and the minutes of the proceedings of the convention are all attached as a part of the pleadings. Fourteen of the respondents were elected originally at the convention held last prior to the Baltimore convention at Scranton, Pa., in 1931, and were re-elected at the later convention in Baltimore. Under the by-laws these fourteen hold office until their successors are elected and qualified. The legality of the proceedings of the Scranton convention is not questioned. It is apparent, therefore, that as to these fourteen officials an ouster from their present offices is impossible in these proceedings. However, the relators challenge the right of these with the other respondents.

The pleadings are voluminous. The parties have agreed to reduce their respective contentions from twenty-two to seven, and to these we have given consideration.

II. The relators base their first contention upon the charter of the Alliance. They say it provides for "triennial" conventions; that the 27th convention held at Baltimore was a "quadrennial" convention and not a special one, and that the convention was, therefore, illegal and the election held at it void as contrary to the charter. Relators ask us to carefully distinguish between the charter, the certificate of Association and the constitution and by-laws. They say the charter consists of the certificate of association as amended and the statutes covering this subject. Wood v. Mystic Circle, 212 Ill. 532; Fraternal Tribunes v. Steele, 114 Ill. App. 194, 215 Ill. 190;

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Sherry v. WCOF, 166 Ill. App. 254. Article 1, section 2 of the constitution provides that the convention of the Alliance "shall meet for deliberation at the time and place fixed by the last preceding convention." The time and place of the meeting of the Baltimore convention was fixed at the last preceding convention, held at Scranton, Pa. The relators, however, contend that section 2 is inconsistent with the charter and for that reason void. The charter is attached to the pleadings. It appears to have been granted March 30, 1896. At that particular time the Alliance was accustomed to hold "biennial" conventions. The charter by clause 5 grants the supreme power of the order to a central government, composed of ten men "to be elected by the representatives of the members of the respective groups thereof at the 'biennial' session of the Alliance." Clause 7 of the charter, after stating the names of the first ten directors, provides that their successors shall be elected by the representatives of the members of the respective groups thereof "at the 'biennial' session of the Alliance, which is the supreme legislative body of the Alliance."

July 18, 1917, there was filed with the Secretary of State at Springfield a certificate to the effect that at the regular "biennial" convention of 1915 a resolution was adopted by which the "Articles of Association" were amended "by changing the time of meetings of the supreme legislative body of the society from 'biennial' to 'triennial' sessions." The resolution was submitted to a referendum vote of the groups and approved and ratified by a vote of more than two-thirds of the subordinate groups and thereupon became effective. This amendment was approved by the Director of Trade and Commerce on July 16, 1917, as attested by the Superintendent of Insurance, and filed with the Secretary of State July 18, 1917. Beginning with 1918 the Alliance held "triennial" conventions up to and including the 26th

Sherry v. Kuhn, 160 Ill. App. 548. Article 1, section 1 of the constitution provides that the association of the Alliance "shall have for deliberation of our cause and object fixed by the first quadrennial convention." The time and place of transacting of the legislative convention for the first of the four succeeding conventions, held in Kansas, Pa. The relative, however, contains a provision " in accordance with the constitution and for that reason void. This clause is attached to the pleading. It appears to have been repealed March 26, 1926. At least particular time the Alliance was constituted to hold "biennial" conventions. The constitution by clause 8 permits the general body of the order to a central government, composed of ten men "to be elected by the representatives of the members of the respective groups interest as the 'biennial' session of the Alliance." Clause 7 of the constitution, after stating the name of the first ten directors, provides that their successors shall be elected by the representatives of the members of the respective groups interest "at the 'biennial' session of the Alliance, which is the supreme legislative body of the Alliance."

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convention, held in Scranton in 1931, with the exception of a special convention held in 1923. This 26th "triennial" convention passed a resolution changing the time for holding the convention from "triennial" to "quadriennial." It was not, however, submitted to the subordinate groups for ratification nor filed with the Secretary of State, the Director of Trade and Commerce or the Superintendent of Insurance. However, we find nothing in the charter which is inconsistent with this action. Nor upon examining the law under which the Alliance was incorporated do we find anything therein inconsistent therewith. Reading the petitions it appears that the point is an afterthought.

The first petition is one part of it describes the convention as triennial, in another part as quadriennial. The Baltimore convention was duly called. The call was well known to all the members of the Alliance. Relators knew of it. The greater number of them took part in it. No one of them made any protest on this ground. Section 7½ of the statute above cited requires the approval of the Director of Trade and Commerce of changes in the charter, but reasonably interpreted this must be held to refer to matters which are mandatory under the statute. There is no mandatory provision in the charter with reference to the time of holding these conventions. Relators are not now in a position to claim that a convention in which they participated without protest is void. The first contention cannot be sustained.

III. The second contention of the relators is that the election of the respondents is void for the reason that fifteen directors were elected, whereas only thirteen could legally be chosen. The original Articles of Association named ten persons to act as directors and vested in them the government of the Alliance. It provided for the election of their successors by representatives

[illegible]

[illegible] convention, [illegible] in 1921, [illegible] of a special convention [illegible] in 1924. [illegible] "Informal" convention passed a resolution [illegible] convention from "Union [illegible]" to "[illegible]." [illegible], [illegible] submitted to the [illegible] [illegible] with [illegible] of [illegible], the Director [illegible] or the [illegible] of [illegible]. [illegible], [illegible] the [illegible] in this [illegible]. [illegible] a convention [illegible] the [illegible] "[illegible]" [illegible] [illegible]. [illegible] tions, it remains that the point is [illegible].

The first [illegible] in the [illegible] at it describes the convention as informal, [illegible] part as [illegible]. The [illegible] convention was [illegible] called. The call was [illegible] members of the [illegible]. Delegates [illegible] of it. [illegible] of them took part in it. [illegible] around. Section 74 of the [illegible] above [illegible] of the Director of [illegible] [illegible] reasonably interpreted [illegible] are punishable under the statute. There is no [illegible] in the charter which [illegible] tions. Delegates [illegible] tion in which they participated without [illegible]. [illegible] punishment cannot be sustained.

III. The second [illegible] of [illegible] election of the [illegible] is said that the [illegible] directors were elected, [illegible] only [illegible] by [illegible] convention. The [illegible] Associations [illegible] of directors and vested in [illegible] of the [illegible]. It provided for the election of their [illegible] by representatives

of the group in their "biennial session," which was given supreme legislative power. The number of directors was not expressly limited as provided for in the statutes. If there was a limitation it was only by implication. In 1903 the Articles were amended so as to increase the number of directors to eleven. In 1909, by a like amendment the number was increased to thirteen. In 1915 by like amendment the number was increased to fifteen. The last named amendment, like the preceding amendments, was filed with the Secretary of State, but thus far has not been approved by the Director of Trade and Commerce or by the Superintendent of Insurance. Sec. 7½ of the Fraternal Beneficiary Societies Act (see Ill. State Bar Stats. 1935, page 1924) provides that any corporation, association or society organized under the provisions of the act may change its article of association in the manner prescribed by its own rules, but no such change shall be of legal effect until a certificate setting forth finally and definitely the changes proposed shall have been submitted to and approved by the Director of Trade and Commerce and filed in his office. Every corporation, association or society organized, having adopted such change in its articles of association, shall comply with the provision of this section within 60 days. It appears that for twenty-four years the Alliance has treated the amendment as in force. It does not appear that any state official has at any time made objection. The Alliance complied with the section in so far as any duty was cast upon it. Three of the relators were candidates for the office of director at the Baltimore convention when 15 directors were chosen. None of them made any objection on this ground. The point was not raised by the original petition. It was first suggested in the additional petition filed June 23, 1936. Moreover, section 7 of the Fraternal Insurance Beneficiary Act (see Ill. State Bar

State. 1935, page 1924) which contains the law applicable to Articles of Association of fraternal corporations, does not limit the number of directors which may be chosen, differing in this respect from many other statutes. For more than 24 years every member of the Alliance seems to have acquiesced in the view that their representatives were entitled to participate in the choice of fifteen directors. Whatever the right of state officials might be, we hold these cannot now, under such circumstances, raise this question. People ex rel. Burl. v. Pierson, 249 Ill. App. 217; People v. Crowley, 250 Ill. 282. Moreover, even if permitted to raise the question, we are unable to see how it could affect any of the respondents, except possibly the two directors who received the least number of votes at the election. We hold against this contention.

IV. The third contention of relators is that the convention should have elected seven men and three women directors, whereas eight men and two women were chosen. Also that 26 commissioners should have been elected, whereas only 17 were chosen. It is difficult to understand the theory of the relators in so far as the election of commissioners is concerned. If the convention should have chosen 26 commissioners and only elected 17 of them, this would be no reason for ousting the 17 who were in fact chosen. The fact that the convention did not elect as many commissioners as it ought to have elected would be no reason for removing those who were elected, thus leaving the corporation without any commissioners. Mandamus to elect others rather than quo warranto to oust those chosen would seem to be the appropriate remedy. In this, as well as other objections made under contention three, the relators rely on the provisions of sections 36, 38 and 42 of the by-laws. The official minutes of the Baltimore convention show, however,

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[illegible]

that the convention amended these sections of the by-laws; that the changes were recommended by the Committee on By-laws and adopted by the convention without protest. The amendments changed the provision which provided for the election of seven men and three women directors. This change provided for the election of five men and two women in directorial district A and either a man or woman in directorial districts B, C and D. Two of the relators participated in this election without objection.

Another objection made is that two women commissioners at large were elected, whereas by the third paragraph of section 38 of the by-laws women commissioners were ineligible for this place. The restriction, however, refers to commissioners elected in particular districts, not to commissioners elected as these were to represent the Alliance as a whole. Evidently it was so understood, for the point was not raised by any objection made at the time of the election.

V. The fourth contention of the relators is that the election of the respondents was illegal by reason of the provision in the constitution of the Alliance to the effect that the election should be held on the 4th day of the convention. In this particular instance it was held on the 8th day. We hold this provision of the Constitution is evidently directory rather than mandatory. People v. Graham, 267 Ill. 426; People v. Miller, 314 Ill. 474. Notwithstanding such a provision, officers chosen at a later day than that fixed, if there is no other infirmity in their titles, are held to be officers de jure. Beardsley v. Johnson, 121 N. Y. 224; Nashua Fire Ins. Co. v. Moore, 55 N. H. 45; In re: Lehigh Term Co., 113 Atl. 327; In re: Farrell, 200 N.Y. Suppl. 95. In fact, counsel for the relators concede that this fact alone would not invalidate the election, but insist that it should have some weight in the consideration of other points discussed.

that the commission recommended some revisions of the by-laws; that the changes were recommended by the committee on by-laws and adopted by the convention without dissent. The question is, was the provision which provided for the election of seven men and three women directors. This change provided for the election of five men and two women in "geometrical district A and either a man or woman in "geometrical districts B, C and D. One of the women participated in this election without objection.

Another objection made is that two women contestants at large were elected, thereby [illegible] the [illegible] of [illegible] 23 of the by-laws which [illegible] [illegible] [illegible] in particular districts, not to contestants elected at large. [illegible] to [illegible], the Alliance on a whole. [illegible] it was so understood, if the point was not raised by any objection made at the time of the election.

V. The fourth contention of the relators is that the election of the respondents was illegal by reason of the provision in the constitution of the Alliance to the effect that the election should be held on the 4th day of the convention. In this particular instance it was held on the 5th day. We hold this provision of the constitution is evidently directory rather than mandatory. [illegible] v. [illegible], [illegible] [illegible] 1. [illegible]. Both in adopting such a provision, officers chosen on a later day than that fixed, it there is no other infirmity in their choice, are held to be officers de jure. People ex r. Toman, 183 N. Y. 384; Matter of the Ins. Co. v. Moore, 95 N. Y. 15; In re: [illegible] 90, 115 Atl. 327; In re: [illegible], 200 N.Y. Supp. 38. In this connection the relators concede that this fact alone would not invalidate the election, but insist that it would have some weight in the consideration of other points discussed.

VI. The relators also contend that the Baltimore convention should be considered only as a special convention at which no officer could be elected. This contention is essentially not different from that which we have already considered in connection with the argument that a "triennial rather than a quadrennial" convention should have been called. What has been already said need not be repeated. The contention cannot be sustained.

VII. The sixth and seventh contentions of the relators may be considered together. These are that the convention was unlawfully convened and the election dishonestly conducted. Contentions of the relators in brief are that for a year prior to the convention Swietlik and others conspired to gain control of the Alliance. To that end Swietlik "hand-picked" a Credentials Committee for the purpose of seating his adherents, thereby gaining control. The three men chosen by him for this purpose were M. Rozicki, who acted as chairman of the Credentials Committee, M. Lada and K. Domanski. As there were only five members of the Committee these three were able to control it. Relators say, that as soon as the names of this Credentials Committee were published in the official organ of the Alliance, challenges against these three were filed with Sweitlik and the Credentials Committee on the ground that these three men were not delegates from their communes and therefore not eligible to sit on the committee; that a report of a committee of five from "said commune" had been filed with the central executive board and the credentials committee; that these came into the hands of Rozicki, who thereafter destroyed them; that the reports of this committee of five showed that these three men were not entitled to sit as delegates or to be members of the committee because they had not been elected representatives; that seven delegates from commune 38, of which Rozicki was one, were duly elected from that commune,

v. The reference then continued that the Lombardo Commission should be considered only as a special commission of which no other could be elected. This declaration is seen, lastly, to differ from that which we have already considered in connection with the answer that a "technical member" and a "political member" commission should have been called. "Just" has been already said that be nominal. The contention cannot be maintained.

VI. The eighth and seventh considerations of the relation may be additional thereto. Thus, the same law commission was unanimously approved and the election laws unanimously. Considerations of the relevancy in right are used for a very prior to the commission omitting any or more complicated to main control of the Alliance. To deny one principle "sub-plotted" a credentials committee for the purpose of sending its delegates, merely omission contrast. The merge was chosen by him for this purpose were: Tomaioli, who acted as chairman of the credentials committee, G. Lada and E. Domenici. As there were only five members of the Committee these three were able to control it. Reports say, that as soon as the names of this credentials committee were published in the official organ of the Alliance, challenges against these three were filed with Bonfilli and the credentials Committee on the ground that these three men were not delegates from their communes and therefore not eligible to sit on the committee; that a report of a committee of five from "Pala commune" had been filed with the contest executive committee and the credentials committee; that these came into the hands of Bonfilli, who thereafter destroyed them; that the reports of this committee of five showed that these three men were not entitled to sit as delegates or to be members of the committee because they had not been elected representatives; that seven delegates from Ozzano, of which Rosichi was one, were duly elected from that commune,

and that they were prevented from taking their places in the house by the credentials committee; that getting no relief from the censor and the credentials committee, 38 delegates and 40 additional delegates sought the aid of the supervisory council, the highest judicial tribunal of the Alliance. In response thereto 14 of the 26 commissioners made a written demand on Swietlik to call a meeting of the council for the purpose of disposing of the complaints. He refused to do so. Then 14 members of the supervisory council made a demand on the central executive board to call a special meeting of the council; this was done. Fifteen members of the council met and by a vote of 14 to 1 decided that the credentials committee, as appointed, was null and void; condemned the conduct of the committee as unfair and unlawful; and appointed a new credentials committee, served notice of their acts on the censor, and demanded the books which were in the possession of the Swietlik credentials committee; the committee refused to surrender these books. The supervisory council insisted on bringing the matter to the attention of the delegates at the opening of the convention but were prevented by Swietlik, who induced them to permit his credentials committee to make its report for the purpose of permitting the seating of representatives on List No. 1, which was supposed to contain only the names of unchallenged delegates, Swietlik promising that when the convention came to order he would permit the council to make its report. The credentials committee did not place only unchallenged representatives upon List 1, but included therein 38 members who were not duly elected, and also withheld from the list the names of 28 unchallenged delegates, who were known to be opponents of Swietlik. When members of the council and other delegates undertook to object they were prevented from being heard by Swietlik, who drowned them out by the use of a "loud-speaker and microphone," ordered the

and that they were prevented from taking their places in the house by the credentials committee; that finding no relief from the house nor the credentials committee, 50 members and 40 additional delegates moved out in a body and formally, the highest judicial tribunal of the nation. In response thereto a committee made a written demand on Whipple to call a meeting of the council for the purpose of discussing the complaints. He refused to do so. Then 21 members of the supervisory council made a demand on the central committee to call a special meeting of the council; this was done. Thirty members of the council met and by a vote of 17 to 2 decided that the credentials committee, as constituted, was null and void; condemned the conduct of the committee in unfair and illegal; and appointed a new credentials committee, served notice of their acts on the seator, and informed the house that they in the possession of the Whipple credentials committee; the committee refused to surrender these rolls. The supervisory council insisted on giving the matter to the attention of the delegates at the opening of the convention. Our rolls prepared by Whipple, who invited them to divide the credentials committee to make its report for the purpose of permitting the seating of Whipple-adherents on list No. 1, which was supposed to contain only the names of unchallenged delegates, unless proof, then, was the convention came to order he would permit the council to make its report. The credentials committee did not [illegible] [illegible] given upon list 1, but included [illegible] the [illegible] duly elected, and also withheld from the list the names of 22 unchallenged delegates, who were known to be opponents of Whipple. When members of the council and other [illegible] [illegible] they were convinced from being seated by Whipple, he drove them out by the use of a "loud-speaker and microphone," ordered the

marshal to remove from the hall everyone whose name did not appear on List 1; swore in the delegates, and then proceeded to pass upon the eligibility of delegates whose names appeared on Lists Nos. 2 and 3, whose rights were challenged. Relators say the factions were about even in number, and Swietlik secured a majority through the 38 delegates mentioned, who voted for him, the majorities ranging from 2 to 27 votes. In this manner it is averred Swietlik obtained control of the convention and elected himself and others respondents. It is said that the credentials committee withheld from List 1 the names of 28 known opponents of Swietlik without any grounds, refused to place on List No. 1 40 representatives against whom there were no challenges, and permitted 16 additional adherents of Swietlik to vote who were not legally elected representatives, and after the convention the chairman destroyed all the records pertaining to this matter. 165 names were reported on List No. 1 against whom challenges had been filed by the committee. The credentials committee in its report stated that it had received challenges against 203 representatives. There were 520 representatives at the convention. List No. 1 therefore should have contained only 317 names. The committee falsely reported 467 names on List No. 1. Challenged representatives, it is said, were not permitted to present their evidence. Contrary to the by-laws, the committee sent out to 100 representatives known to be opposed to Swietlik telegrams and letters telling them not to come to the convention until the challenges against them had been disposed of by the convention. When some of these did appear they were not even given a hearing. The credentials committee, it is said, gave out identification cards to those whom it had illegally decided were entitled to seats in the convention. Only persons holding these identification

marked. In reply, he said everyone whose name did not appear on list 1; above in the telegram, and then proceeded to pass upon the eligibility of delegates whose names appeared on lists Nos. 2 and 3, voting rights were challenged. Regardless any the functions were about over in number, and Swisslik secured a majority through the 30 delegates mentioned, who voted for him, the majorities ranging from 2 to 27 votes. In this manner it is averred Swisslik obtained control of the convention and ignored binsell and others respondents. It is said that the credentials committee withdrew from list 1 the names of 88 known supporters of Swisslik without any grounds, refused to place on list no. 1 40 representatives against whom there were no challenges, and permitted 16 additional adherents of Swisslik to vote who were not legally elected representatives, and after the convention the chairman destroyed all the records pertaining to this matter. 185 names were reported on list No. 1 against which challenges had been filed by the committee. The credentials committee in its report stated that it had received challenges against 302 representatives. There were 500 representatives at the convention. List No. 1 therefore should have contained only 317 names. The committee falsely reported 487 names on list no. 1. Challenged representatives, it is said, were not permitted to present their evidence. Contrary to the by-laws, the committee sent out to 100 representatives known to be opposed to Swisslik telegrams and letters telling them not to come to the convention until the challenges against them had been disposed of by the convention. When none of these did appear they were not even given a hearing. The credentials committee, it is said, gave out identification cards to those whom it had illegally seated entitling them to seats in the convention. Only persons holding these identification

cards were permitted to take their seats at the opening of the convention. This was in violation of the by-laws. In addition, it is said, 75 representatives who took part in this convention were not elected by a majority vote of the members. Notwithstanding this election procedure, it is said respondents were elected by a narrow margin running as low as 20 to as high as 80 votes.

The above we think gives a fair summary of the averments of these voluminous petitions. The averments are stated largely by way of conclusions of the pleader and must be examined in the light of the exhibits, the charter, the constitution and the by-laws and minutes of the convention, all of which are attached and are controlling. From these it appears the Baltimore convention was composed of 520 delegates representing 179 communes. Each commune was entitled to one representative in the convention for every 400 adult members of the particular commune. The representatives to the conventions were chosen in this manner: about 90 days prior to each convention each commune held an electoral assembly. All the groups in the commune sent delegates to the electoral assembly in the proportion of 1 delegate for every 25 adult members. At this electoral assembly there were selected nominees for the post of representative of the commune to the convention of the Alliance to be held in Baltimore. After the nominations were made the groups in the commune elect the representatives from among these nominees. The result of the balloting, with respect to each group, is certified to by a board of five election judges. If there is a contest as to the election of any representative, it must be submitted in writing to the executive boards of the communes. An election contest commission was then created to hear the contest. This local election contest commission was composed of two members appointed by the executive board of the commune, two chosen by the aggrieved and defeated candidate, the fifth to be selected by these

cards were permitted to take their seats at the session of the convention. This was in violation of the by-laws. In addition, it is said, 76 representatives who took part in this convention were not elected by a majority vote of the members. Accordingly, this election procedure, it is said requirements were elected by a narrow margin ranging, as low as 30 to as high as 36 votes.

The above we think gives a fair summary of the arguments of these voluntous petitions. The records are taken largely by way of conclusions of the pleader and may be examined in the light of the weighing, the charter, the constitution and the by-laws and minutes of the convention, all of which are admitted and are controlling. From these it appears the Baltimore convention was composed of 300 delegates representing 178 communes. Each commune was entitled to one representative in the convention for every 400 adult members of the particular commune. The representatives to the convention were chosen in this manner: about 90 days prior to each convention each commune held an electoral assembly. All the groups in the commune sent delegates to the electoral assembly in the proportion of 1 delegate for every 25 adult members. At that electoral assembly, each was minister candidates for the post of representative of the commune to the convention of the Alliance to be held in Baltimore. After the nominations were made the groups in the commune elect the representatives from among these nominees. The result of the balloting, this respect to each group, is certified to by a board of five election judges. If there is a contest as to the election of any representative, it must be submitted in writing to the executive boards of the commune. An election contest commission was then created to hear the contest. This local election contest commission was composed of two members appointed by the executive board of the commune, two chosen by the aggrieved and defeated candidates, the fifth to be selected by these

four as a "super-arbitrator." This local contest commission was charged with the duty of hearing the contest and its decision was final except in the case of a further appeal to the committee on credentials and control, which is a convention committee appointed by the censor. The committee of credentials and control consists of five representatives to the convention. Its duty is to hear and to act with respect to appeals from the decisions of the local election contest commissions upon contests of defeated candidates for the office of representative to the convention. The credentials committee had no power to consider cases which had not been examined by the local election contest commission. From the action of the committee on credentials and control, parties thinking themselves aggrieved were entitled to a further appeal to the convention itself. As respondents point out, every defeated candidate for representative had four possible remedies under the rules of the constitution and by-laws. He must first make a written protest to the commune, and, second, if ineffective, he might then obtain a hearing by a local election contest commission appointed as above described. If not satisfied with the decision of the local committee he had a right to obtain a hearing before the committee on credentials and control, and if the decision of that committee was adverse he was finally entitled to take an appeal to the convention itself.

Respondents point out that there is no allegation in the petitions that any one of the candidates who were declared elected at the Baltimore convention received a less number of votes than the opposing candidate.

It is not claimed that there was any inaccuracy in the counting of the ballots or in the tabulation thereof, or any fraud in the manner in which the vote was taken and counted.

four as a "umpire-arbitrator." This local contest committee was charged with the duty of hearing the contest and its decision was final except in the case of a further appeal to the committee on credentials and control, which the convention committee appointed by the courts. The committee on credentials and control consisted of five representatives of the convention. Its duty was to hear and to act with reference to appeals from the decisions of the local election contest committee upon contests of defeated candidates for the position of representative to the convention. The credentials committee had no power to consider cases which had not been presented to the local election contest committee. From the action of the committee on credentials and control, parties thinking themselves aggrieved were entitled to a further appeal to the convention itself. As regards the procedure, every defeated candidate for representative had four possible remedies under the rules of the constitution and by-laws. He must first make a written protest to the council, and, second, if ineffective, he might then obtain a hearing by the local election contest committee appointed as above described. If not satisfied with the decision of the local committee he had a right to obtain a hearing before the committee on credentials and control, and if the decision of this committee was adverse he was finally entitled to take an appeal to the convention itself.

Respondents point out that there is no allegation in the petitions that any one of the candidates who were declared elected at the district election received a less number of votes than the opposing candidate.

It is not claimed that there was any inaccuracy in the counting of the ballots or in the tabulation thereof, or any fraud in the manner in which the vote was taken and counted.

The petitions aver serious charges were made against M. Rozicki; that by reason thereof he was not competent to act on the credentials committee; but the petitions do not show what the nature of these serious matters were, nor whether they were such as to preclude him from acting on the committee under the constitution and by-laws.

There is no allegation that any local election contest commission was ever appointed to consider any contest as to his election. As a matter of fact, the election of Rozicki was challenged. The duty in the first instance rested upon officers of the commune under the constitution and by-laws to appoint two members of the committee to investigate the matter; the defeated candidate to appoint two others; these four to choose a fifth; thus forming a local commission composed of five members. The petitions do not aver that this procedure was complied with in this case. The petitions do not aver that M. Rozicki received fewer votes than his opponent at the election, or that the candidate opposed to him, who was defeated, contested the election before the local committee. As to M. Lada likewise there is the same lack of material averments. His right, it is said, was challenged, but upon what grounds the petitions do not inform us. The same situation exists as to M. Domanski. It is manifestly impossible to hold that there was no lawful committee on credentials, or that the convention was illegally constituted on this account. The averments of the petition in this respect, in the light of the provisions of the by-laws and constitution, are mere conclusions of the pleader.

Relators say that 78 delegates sought the aid of the supervisory council and that 14 members thereof made a written demand on the censor, etc., but there is no averment in the petition from which it appears that these 78 objectors (or any

The petitions were merely signed with "Count ..." Hosiery; that by Mr. Count's office was not considered by or to the credential committee; but the evidence is not that the nature of these petitions mattered here, nor that they were used as to provide him from action, as was instructed under the constitution and by laws.

There is no difficulty from any known election contest conclusion was ever appointed or entitled any counsel in an election. As a matter of fact, the committee of contest was unlimited. The duty is the first instance rested upon contests at the commons under the constitution and by-laws to consider the members of the committee to investigate the matter; the declared candidate to respond two others; these four to choose a fifth; thus forming a local commission composed of five members. The petitions do not ever that this procedure was complied with in this case. The petitions do not ever that M. Hosiery received fewer votes from his opponent at the election, or that the candidate opposed to him, who was defeated, contested the election before the local committee. As to M. Lamb Jiroviec there is the same lack of material evidence. His right, it is said, was challenged, but upon what grounds the petitions do not inform us. The same election exists as to M. Demarest. It is absolutely impossible to said that there was no lawful qualified on credentials, or that the convention was illegally constituted on this account. The statements of the petition in this respect, in the light of the provisions of the by-laws and constitution, are mere conclusions of the pleader.

Relators say that 76 delegates secure the aid of the secretaries council and that 14 members inserted such a written demand on the counter, etc., but there is no evidence in the petition from which it appears that these 76 objectors (or any

one of them) ever pursued the remedies which were available to the defeated candidates. The censor was powerless to act until relief had been sought under these provisions. The same observations may be made as to the matter of the executive committee and the demand made upon it for records, books and documents in the possession of the censor. Manifestly, under the circumstances, the censor had no right to deliver up such books, records and documents.

The relators say that the committee on credentials and control seated some 38 representatives who were not entitled to seats in the convention; but it does not appear that these defeated candidates for representative presented contests to the commune or to the election contest commission thereon, or to the convention itself. Moreover, none of these defeated candidates has joined in this suit. Manifestly, under such circumstances, it is impossible to hold that the defeated candidates were wrongfully deprived of their seats in the convention.

Relators, by their amended petition, show that the election of 317 representatives was unquestioned and unchallenged. 261 of the total of 520 representatives would constitute a quorum. It would appear that these 317 representatives were, therefore, properly seated, had full power and authority to pass upon the election contests of any representatives who might feel themselves aggrieved and apply to the convention for relief.

If the minutes of the convention are examined, it appears that relators are wholly without reason to complain. It appears therefrom that the censor requested that all contesting representatives be given an opportunity to present their contests directly to the convention; that on the motion of one of the relators it was voted that "all members on either side" be given an opportunity

one of them) over numerous but insignificant minor matters in the defeated committees. The minor representations, however, did not still relief and been sought under their or [illegible]. The more serious [illegible] may be made on the ground of the executive committee and the demand made upon it for the [illegible] the possession of the convention. Manifestly, under no circumstances, for cannot and be allowed to indulge in such [illegible] results and disorder.

The problem was that the committee of credentials and contested seats. Its representatives were not individuals seats in the convention; but it was necessary that there be [illegible] contested candidates for representative elected conferees to the convention or to the district central committee, or to the convention itself. Moreover, there are three delegated conventions that joined in this suit. Manifestly, under such circumstances, it is impossible to hold that the defeated candidates were actually received or their seats in the convention.

Moreover, by their amended petition, they ask the election of 327 representatives was undemocratic and unconstitutional. 201 of the total of 320 representatives were [illegible] a [illegible]. It [illegible] [illegible] only, therefore, properly seated, had full power and authority to pass upon the election contests of the representatives who did not feel themselves approved and legally to the convention for relief.

If the minutes of the convention are inquired, it appears that relators are wholly without reason to complain. It appears therefrom that the author requested that all contesting representatives be given an opportunity to present their motions directly to the convention; that on the motion of one of our relators it was voted that "all members on either side" be given an opportunity

to present their cases directly to the convention, and that each contestant was thereupon given 15 minutes for that purpose; that afterward on the motion of the same relator, this time allowed was reduced to 10 minutes; that the convention spent practically all of its time during the second session, which lasted from 2:15 p. m. to 6:00 p. m., and during the third session, which lasted from 8:00 p. m. to 12:10 a. m., during the fourth session, which lasted from 9:23 a. m. to 12:15 p. m., during the fifth session, which lasted from 2:25 p. m. to 6:00 p. m., during the sixth session, which lasted from 8:40 p. m., to 12:05 a. m., during the seventh session, which lasted from 10:35 a. m. to 12:40 p. m., to the consideration of contests by representatives. Sometimes the convention overruled, sometimes sustained the recommendations of the committee on credentials and control, and the voting does not show any set party lines. Seven sessions out of a total of sixteen, and 2½ days out of a total of 7½ were spent in the examination of contests of candidates for representative. It would seem relators have no ground to complain that they were refused a hearing.

As a matter of fact the convention seated one of the additional relators, Kalisz, after deciding a contest in his favor. No defeated candidate for representative has protested against the action of the convention by joining in this suit. The complaint that persons with grievances were prevented from a hearing by the use of a loud speaker and microphone on the part of Swietlik, who then proceeded to swear in some delegates preparatory to passing on the eligibility of the delegates whose rights were challenged, is inconsistent with the proceedings as shown by the minutes of the convention, which is a part of the pleading.

These petitions by relators, considered as a whole, amount

to against both sides directly at the convention, at that time consequently was [illegible] candidates for both parties; but after[illegible] the adoption of the new rules, the time allowed was reduced to 10 minutes; [illegible] the convention [illegible] all of the time during the general session, which lasted from 9:15 a. m. to 1:00 p. m., and during the night session, which lasted from 8:00 p. m. to 10:30 p. m., during the [illegible] session, which lasted from 8:00 p. m. to 1:0 a. m., during the night session, which lasted from 8:00 p. m. to 9:00 p. m., during the sixth session, which lasted from 9:15 p. m. to 10:30 p. m., during the seventh session, which lasted from 10:30 p. m. to 11:45 p. m. To the consideration of matters by representatives, sometimes the convention overruled, sometimes reversed the recommendations of the committee on credentials and contests, and the voting does not show any set party lines. Women delegates cast a total of eleven, and 8½ days one of a total of 7½ were spent in the examination of contests of delegates for representatives. It would seem referees were so pressed to complete their duty were required a hearing.

As a result of that the convention seated one of the [illegible] tional referees, Haines, after deciding a contest in his favor. So defeated candidate for representative was prominent during the session of the convention by joining in this suit. The complaint that persons with grievances were prevented from a hearing, by rise of a land speaker and misconduct on the part of officials, who then proceeded to sweep in some delegates presumably to vanish on the eligibility of the delegates whose rights were challenged, is inconsistent with the proceedings as shown by the minutes of the convention, which is a part of the pleading.

-Some petitions by relators, considered as a whole, account

in substance to the contest of the election held at the 27th convention. In order to prevail it was necessary that the petition should aver facts,not conclusions, from which it would appear that in the absence of the illegal and improper matters of which they complain a different result would have been obtained. These petitions do not set forth such facts.

VIII. The law applicable to proceedings of this nature is well settled. It is necessary that the petition shall disclose facts to the court sufficient to show there is a probable cause. People v. Union Elevated Ry. Co., 263 Ill. 32. The petition must recite facts, not mere conclusions, and the averments of fact therein must be made in such manner that, if the material allegations are false, perjury might be assigned thereon. People v. Emmerson, 313 Ill. 209; People v. France, 314 Ill. 51. The writ of quo warranto is not a writ of right, but the granting of it lies in the sound judicial discretion of the court. The court should carefully consider all the facts and circumstances, the motives of the relators, the public interest, the necessity of the parties and the entire situation from the standpoint of the parties and of the public. People v. Chandler School District, 311 Ill. 224; People v. Miller, 331 Ill. 395. The petition stands as a complaint. If it is sufficient, a rule to show cause is entered. The issues are made by the complaint and may be denied in the answer to the rule to show cause. But an answer to the petition is not proper and does not avail. People v. Drainage District, 193 Ill. 428.

IX. We have considered the averments of these petitions in the light of the constitution and the by-laws, the interests of the respective parties to the litigation and the organization of which they are members, and the rules of law as laid down in the

[illegible] vention. In order to prevent it was necessary that the petition should have facts, not bare claims, that relate to people other than the defendants of the illegal and improper nature of which they complain a different result would have been obtained. These petitions do not set forth such facts.

VIII. The law applicable to prosecutions of this nature is well settled. It is necessary that the prosecution should disclose facts to the court sufficient to show that there is a probable cause. People v. Judge Kilpatrick, [illegible], 357 Ill. 98. The position must rest on facts, not mere conclusions, and the prosecution of facts therein must be made in such manner that, if true, it would disclose a violation. Hoffman v. Hartman, 318 Ill. 279; Powell v. Tanner, 16 Ill. 32. The writ of quo warranto is not a writ of right, but the granting of it lies in the sound judicial discretion of the court. The court should carefully consider all the facts and circumstances, the motives of the relators, the public interest, the necessity of the proceeding and the public advantage from the continuance of the proceeding and of the public. People v. Chicago Tunnel District, 321 Ill. 224; People v. Kilgore, 321 Ill. 97. The petition should be a complaint. It is in substance, a [illegible] now [illegible] the issues made by the complaint and [illegible] answer to the rule to show cause. This is proper in the [illegible] is not proper and is not valid. Hoffman v. Tribune Printing Co. 325 Ill. [illegible].

IX. We have considered the propositions and cases presented in the light of the constitution and the by-laws, the purposes of the respective parties to the litigation and the organization of which they are members, and the rules of law as laid down in the

foregoing decisions. In the trial court the appeal of the relators was to the judicial discretion of the court. In this court, upon appeal, the question is whether the trial court rightly exercised its judicial discretion in refusing to permit the writ to issue. For the reasons indicated we hold that the trial court properly exercised its discretion in refusing the writ, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

[illegible]

[illegible]

[illegible]

39162

ELEANOR K. RUDDIMAN,
Appellee,

vs.

ECLIPSE LAUNDRY CO., a Corporation,
and LEON BERNBACH,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

289 I.A. 509

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

About 3 o'clock in the afternoon of May 18, 1934, plaintiff was driving a Nash sedan westward on 58th street in Chicago; defendant Bernbach was driving a Chevrolet laundry truck belonging to his employer, the Eclipse Laundry Co., northward on Woodlawn avenue; at the intersection of these streets defendants' truck ran into plaintiff's sedan, injuring her; she brought suit and upon trial had a verdict of $15,000; the court required a remittitur of $5000 and judgment of $10,000 was entered against defendants, from which they appeal.

On 58th street, before entering Woodlawn, is a "Stop" sign facing vehicles going west, and on Woodlawn, before entering 58th street, is a "Slow" sign facing vehicles traveling north; on the southeast corner the view was obstructed by shrubbery and trees growing on the lot inside the sidewalk line.

Plaintiff testified that she was going west on 58th street and as she approached Woodlawn she came to a complete stop, looked both to the north and to the south on Woodlawn and noticed a car approaching on Woodlawn from the south about half a block away; that she then proceeded to cross Woodlawn, going about five or eight miles an hour, and when she got half way across Woodlawn she saw defendants' truck "flashing" at her and it struck her car on the left side near the rear. Defendant Bernbach testified that he saw plaintiff's car when it was about fifteen feet east of Woodlawn

and that it did not stop but came into the intersection at about thirty miles an hour.

Charles Wood gave testimony tending to corroborate plaintiff's story. He said that when her car passed him on 50th street 125 feet east of Woodlawn, it was slowing down and was then travelling 15 to 20 miles an hour. George Klamm testified that he was driving north on Woodlawn, a short distance behind defendants' truck, that it was swaying first to the left and then to the right, and that immediately prior to the collision it was on the west side of Woodlawn. Defendants introduced evidence tending to show that the speed of defendants' truck was regulated by a "governor" set for a maximum speed of 28 or 30 miles an hour.

Plaintiff's car weighed 4200 pounds, defendants' truck 1800. Photographs of plaintiff's car taken after the accident show substantial and severe damage, indicating that defendants' lighter truck must have been going at a high rate of speed to inflict such damage.

Defendants argue earnestly and with skill that there was no question of fact to be submitted to the jury; that the defendants were not guilty of negligence and that plaintiff was guilty of contributory negligence. It has been repeatedly said in many decisions that as a general rule questions of negligence and contributory negligence are questions of fact for the jury (Petro v. Mines, 299 Ill. 236) and that the question of contributory negligence becomes a question of law only where the undisputed evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of the negligence of the party injured, and that if reasonable minds arrive at different conclusions, then it is a question for the jury. Chicago City Ry. Co. v. Nelson, 215 Ill.436.

In the present case there is some conflict in the evidence

as to material points. There is a dispute as to whether plaintiff stopped before entering Woodlawn avenue, and also a dispute as to the speed of defendants' truck as it approached 58th street. The variant testimony was for the jury to weigh, and its conclusion to accept plaintiff's version cannot be said to be unreasonable.

The jury could also properly conclude that plaintiff was not guilty of contributory negligence and that defendants were guilty of negligence as charged. Under such circumstances the court of review will not disturb the verdict.

Upon the motion for a new trial defendants presented what is designated as newly discovered evidence. The trial court, however, was of the opinion that this evidence could have been presented by defendants at the trial. Plaintiff was injured May 16 and taken to the Billings hospital where X-rays of her injuries were taken on May 17; these were not introduced upon the trial, but X-ray plates taken on June 30 were introduced by the plaintiff. Defendants on their motion for a new trial presented an affidavit to the effect that prior to the trial their attorney attempted to obtain information from Billings hospital concerning the physical condition of plaintiff when she was admitted, but was refused such information; that after the trial, under a subpoena duces tecum, the hospital produced X-ray plates of the plaintiff with findings taken on May 17 which tended to show an absence of injuries which were shown by the X-ray plates taken on June 30 and introduced on the trial by plaintiff. However,,it was shown to the court by an affidavit of the attorney for plaintiff that defendants' counsel knew some time prior to the trial that plaintiff was taken to the Billings hospital immediately after the accident and that X-ray pictures were taken there, and it was asserted that defendants had sufficient time to obtain and introduce them in evidence at the trial. The affidavit of plaintiff's counsel further tended to

show that the X-ray pictures taken at the Billings hospital were not taken for the purpose of showing the condition of the vertebra and that no pictures showing this condition were taken at the Billings hospital. Even if we assume that the X-ray plates taken at Billings hospital on May 17 were of any substantial importance, (which is very doubtful) yet it is clear that defendants' counsel could have obtained them by a subpoena prior to the trial just as easily as they were produced upon a motion for a new trial. The court's ruling in this respect was proper.

Upon the trial there was submitted to Dr. Samuels a long hypothetical question to which defendants objected on the ground that it omitted some material facts. All the facts stated in the objection by counsel for defendants were adopted in the final form of the question. Defendants say that one of the facts assumed was no injury to plaintiff between May 16 and June 30, 1934. Whether plaintiff received in this interval any injuries could have been easily determined by defendants, and we know of no rule which would raise any presumption of any other injuries than those received in the accident which is the basis of this suit. Moreover, the record shows that the possibility of an accident to plaintiff between these dates was discussed by both counsel in the presence of the jury, so that it must have considered this fact in arriving at a verdict.

Complaint is made of the cross-examination by plaintiff's counsel of the witness Peterson, a police officer who made a report as to the appearance of the cars and certain tire burns or skid marks after the accident. This testimony was not important and any errors with reference to asking questions without a proper foundation are not prejudicial.

We agree with the contention of defendants' counsel that

the questions to defendant Bernbach as to whether he had a license to drive his employer's truck at the time of the accident or at the time of the trial were improper, but nothing sufficiently serious to require a reversal occurred either in the examination of the witnesses or in the argument of plaintiff's attorney to the jury.

Defendants say that the judgment of $10,000 is excessive. Plaintiff suffered diagonal fractures of two ribs on the right side and a fracture of the eleventh dorsal vertebra; she was three days in Billings Memorial hospital and two weeks in Michael Reese hospital; she was put in a plaster cast from June until August, 1934, extending the spine; for four months and over she wore a steel brace extending from her hips to her neck and was wearing a steel corset at the time of the trial, which was nearly two years after the date of the accident. There was evidence that twenty-two months after the accident the dorsal vertebra was compressed; during this time she suffered from pains in the back and was unable to stand on her feet for any long period. We cannot say that the judgment of $10,000 is excessive.

Although there may have been slight errors during the trial there is no reason to believe a different result would follow upon a second trial. Where a trial has resulted in substantial justice, slight errors will not compel a reversal.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39186

3

UNDERGROUND CONSTRUCTION COMPANY, a Corporation,
Appellee,

vs.

THE SANITARY DISTRICT OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 609

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon trial, without a jury, in an action to recover damages on account of defendant's breach of a contract, plaintiff had judgment for $60,866.58, from which defendant appeals.

This case has been tried three times. After the second trial appeal was had to this court, which reversed the judgment and remanded the cause for another trial. (277 Ill. App. 618.)

April 26, 1928, plaintiff and defendant entered into a written contract whereby plaintiff was to construct a bridge, superstructure and approaches over the Sanitary canal on south Crawford avenue in Chicago; the contract called for monthly payments in installments as the work progressed; the work was commenced and several monthly installments paid. The installments due December, 1928, and January, 1929, were not paid because defendant was enjoined by court order from selling its bonds; for this reason plaintiff suspended work. Afterward legislation was obtained authorizing the bonds and on November 21, 1929, plaintiff resumed work, at which time a supplemental agreement was entered into extending the time within which the work was to be completed; thereafter the work was completed by plaintiff, who was paid in full for the work done. Plaintiff claims to have suffered damages on account of the suspension of the work caused by defendant's failure to pay the monthly installments provided in the contract.

Plaintiff contended upon the prior appeal that defendant's chief engineer had agreed that plaintiff might suspend the work and

that it would be paid all damages occasioned by such suspension. After examination of the evidence, which is set out in our opinion in considerable detail, we held that the evidence did not support this contention; that the most that could be said is that the engineer had expressed the thought that plaintiff would be entitled to consideration for damages.

Upon the present trial counsel for plaintiff suggests that there was further evidence tending to support the claim that defendant's engineer had promised that plaintiff should be reimbursed for damages, but this additional evidence does not add anything substantial to this issue and we reassert our conclusion that the evidence fails to show any such promise by the chief engineer.

Defendant argues that as plaintiff has failed to prove any promise to pay, plaintiff cannot recover special damages. The original declaration consisted of the common counts and a special count, predicated upon the theory of the chief engineer's promise to pay; subsequently plaintiff filed two additional counts claiming damages for breach of contract predicated upon the theory of a direct liability of the defendant without reference to any promise of the engineer; demurrers were filed to these additional counts, which were overruled, and defendant filed pleas and affidavits of merits, to which plaintiff filed a replication. The case was retried on the theory that the defendant is liable independently of any promise by the chief engineer. It is axiomatic that one good count will support a judgment.

The brief of the defendant filed in this appeal is virtually a reprint of the brief filed by it upon the prior appeal and makes the same points and argument we considered and passed upon in that appeal. We there held that "Plaintiff having had the right to suspend the work on account of the default in payment of the installments, may recover as damages any direct loss sustained by it.

Louisville & N. Ry. Co. v. Mollerbach, 105 Ind. 137; Selden Breck Const. Co. v. Regents of Mich., 274 Fed. 982."

We are not only constrained by our prior holding (Gillum v. Central Illinois Public Service Co., 25[illegible] Ill. App. 617, 622) but we reassert our conclusion on this point. It has been so held not only in the cases cited in that opinion, but also in Tobey v. Price, 75 Ill. 645, and [illegible] v. World's Col. Exp. Co., 110 Ill. App. 210.

In our prior opinion we stated our views for the guidance of the trial court upon the next trial. We held that the measure of damages for the loss of use of machinery and equipment was its fair market rental value; we held against plaintiff's claim for interest on the amount retained by defendant under the contract during the time the work was suspended; we also held that plaintiff had the right to suspend the work on account of the non-payment of the December and January installments; we also held against defendant's contention that plaintiff's damages are limited to wages paid by it for necessary watchmen during the period the work was suspended, and for extra premiums paid by plaintiff on its bond on account of the additional time required to complete the work. On the prior appeal it was contended that the act of plaintiff in obtaining judgment for the amount of two installments, which has since been paid, is res adjudicata of plaintiff's entire claim. We held this contention was without merit.

Upon this last trial a stipulation of facts was entered into between the parties, giving a history of the transaction and the work involved and the supplemental agreement; the parties stipulated as to the correctness of the amounts claimed as damages suffered by plaintiff by reason of the suspension of the work; these are wages, rental charges, cleaning, reconditioning forms

and equipment and differences in the scale of wages; these aggregate $60,866.58, the amount of the judgment; defendant in the stipulation reserved only the question of its liability. The stipulation followed the items of damages which we have already approved in our prior opinion, and, as we said in that opinion, defendant is liable for such damages.

Upon the prior appeal it was asserted that the court improperly ruled on propositions of law submitted, and the same argument is made upon the present appeal. We find no reversible error in this respect.

After the decision of this court on the former appeal there was nothing for the trial court to do after the case was remanded except to pass upon the amount of damages plaintiff had sustained, following the directions laid down in our opinion, and as the amounts are stipulated to be correct the trial court could only assess the damages against the defendant.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39195

CHARLES F. ALEXANDER,
Appellant,

vs.

STATE SAVINGS BANK & TRUST CO., et al.,
Defendants.

On Appeal of CHARLES F. ALEXANDER,
Appellant,

vs.

LIBERTY NATIONAL BANK OF CHICAGO,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

289 I.A. 610

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This cause is here on its second appeal; on the first defendant appealed from a judgment for $5991.53 entered against it by decree pro confesso upon an order of default; defendant filed its motion and petition (chap. 110, par. 270, Ill. State Bar Stats.) seeking to have the default order and decree vacated; the trial court denied this motion and defendant appealed to this court.

In our opinion filed on that appeal (281 Ill. App. 88) we held that sufficient service had been had upon defendant, but also held that the petition alleged facts which, if they could be proven by defendant, would relieve it from any liability; we reversed the judgment and remanded the cause for further proceedings consistent with what was held in that opinion; the mandate was filed in the Circuit court, which thereafter proceeded as we had directed and vacated the order of default and the judgment; defendant filed an answer amplifying the allegations in its petition, the matter was referred to a master in chancery who heard evidence and reported, finding that the allegations of defendant's answer had been proven and recommending that the complaint be dismissed; exceptions were overruled and the chancellor entered an order dismissing the complaint

and plaintiff now appeals.

The brief for the plaintiff has failed to observe our rule 7 relating to briefs; it makes thirteen points but the argument does not follow these. Plaintiff's argument seems to be that the cause was reversed and remanded without specific directions, which does not have the effect of vacating all orders entered prior to the appeal. Our opinion ordered the judgment reversed and the cause remanded for further consistent proceedings; the mandate ordered that the judgment of the Circuit court "be reversed, annulled, set aside, and wholly for nothing esteemed," and the cause was remanded for further proceedings as to law and justice shall appertain consistent with the views expressed in the Appellate courtopinion. Pursuant to this opinion the trial court vacated the order of default and the judgment and in so doing followed the directions given by this court.

The master found that on April 15, 1926, Mrs. Lee De Wilt entered into a written contract with the Independence State Bank as trustee for the purchase of certain real property; that subsequently she assigned this to plaintiff; that subsequently a deed was issued conveying the property; that in March, 1930, the Independence State Bank sold to the State Savings Bank & Trust Co., which did not assume any liability to plaintiff, a part of its assets as listed.

That in June, 1931, the State Savings Bank & Trust Co. sold to the Liberty Trust and Savings Bank a part of its assets as listed, but the purchaser did not assume liability to plaintiff.

That in December, 1932, the Liberty Trust and Savings Bank sold to the Liberty Bank of Chicago a part of its assets, and the purchaser did not assume any liability to plaintiff.

That in August, 1934, the Liberty Bank of Chicago was converted into a national bank and became known as Liberty National

Bank of Chicago; that none of these banks was taken over or amalgamated with each other but still retained their corporate entities and possessed assets belonging to each bank individually.

The master also found that plaintiff offered no proof to sustain the allegations of his complaint, except the original contract of June, 1926, between the Independence State Bank and Mrs. De Wilt, and a deed executed in August, 1931, to her; the master found that plaintiff had failed to show any contractual relationship with the defendants or that any liability accrued by operation of law, and that the listed liabilities of the banks did not include the liability upon which plaintiff predicates his claim.

In our opinion upon the prior appeal we held that if these facts could be proven there could be no recovery against the Liberty National Bank of Chicago. This was the law of the case, binding upon the lower court upon a new trial and also upon the Appellate court upon a subsequent appeal. Gillum v. Central Illinois Public Service Co., 250 Ill. App. 617, 622.

We find no error in the proceedings in the trial court following the mandate from this court, and the decree dismissing the complaint was fully justified from the evidence. It is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39136

PEOPLE Ex Rel. HELEN F LEMING CZACHORSKI, Relator, Appellant,	)
vs.	) APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
BARBARA ANNA FISHER, Respondent, Appellee.	)

289 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The People on the relation of Helen Fleming Czachorski by leave of court filed an information in the nature of a quo warranto. In her petition for leave to file the information against Barbara Anna Fisher, Mrs. Czachorski set up that she was duly elected attorney for the Polish Women's Alliance of America, a corporation organized under the laws of Illinois, at a convention of the organization held in Chicago on September 28 and 29, 1935; that at such election she received 210 votes and Mrs. Fisher 205 votes, and she was declared duly elected; that Mrs. Fisher, without warrant or authority, assumed to act as attorney for the Alliance and prevented the petitioner from exercising the duties of her office; the prayer was that she be given leave to file her petition and that Mrs. Fisher show by what authority she claimed to exercise the office of attorney. Leave was granted, the petition filed, and after a number of motions and orders were entered the pleadings were settled and there was a hearing before the court without a jury. The court found Mrs. Fisher had been duly elected as attorney for the Alliance, judgment was entered accordingly and Mrs. Czachorski, the relator, appeals.

The record discloses that the relator and the respondent are members of the bar of Illinois and that the relator has been attorney for the Alliance about 21 years, having been re-elected a number of times; that a convention of the Alliance was held in Chicago on September 28 and 29, 1935, at which officers were to be elected, including an attorney; that the relator and the respondent were

candidates for the office and their names, together with the names of candidates for other offices, appeared on printed ballots. An election committee was appointed to count the ballots; they completed their work about five o'clock a. m. on Sunday morning, September 29, and shortly thereafter reported to the convention that Mrs. Czachorski had received 210 votes and Mrs. Fisher 205 votes. Mrs. Fisher objected at the time, claiming the result was incorrect and requesting an immediate recount; this request was about to be granted by the convention, but it was stated that the ladies comprising the election committee were physically unable to recount the ballots at that time because they had been at work all night, and thereupon the matter of the recount was put over until ten o'clock Monday morning, September 30. Mrs. Czachorski objected, claiming that she had been duly elected, but the objection was overruled and the recount ordered. The chairman of the convention then called on all the newly elected officials to come forward and be sworn in and Mrs. Czachorski went forward with the newly elected officers and the oath was administered to her over the objection of Mrs. Fisher, the chairman stating the oath would not be valid if the recount did not show Mrs. Czachorski elected. Shortly after this the convention adjourned. Monday, September 30, pursuant to the action of the convention, the election committee recounted the ballots and reported that Mrs. Czachorski had received 209 votes and Mrs. Fisher 216, and reported this fact to the officers of the Alliance on October 15, 1935. Thereupon Mrs. Fisher assumed the duties of the attorney for the Alliance and Mrs. Czachorski was prevented from so acting.

November 4, 1935, the instant suit was brought and the ballots were counted by the court. The court found that Mrs. Czachorski had received 208 votes and Mrs. Fisher 212 votes; that

there were 430 ballots cast, 5 of which were spoiled and five other voters did not vote for the office of attorney. The court entered judgment on its finding as above stated.

The relator contends that when the election committee on Sunday morning, September 29, made its report which showed to the convention the correct result, and the relator was thereafter sworn in as attorney, the recount by the election committee on the 30th was of no effect and void because in the meantime the convention had adjourned. The relator further contends that the respondent did not sustain the burden the law cast upon her to show that the ballots were so kept after the election that there was no reasonable opportunity to tamper with them, and therefore the ballots were not properly considered by the election committee on the recount,or by the court.

A great deal is said by counsel for both parties as to the facts and the law in relation to the recounting of the ballots by the committee of the convention on Monday, September 30, the relator taking the position that it was of no effect,while the contrary is contended for by the respondent. We think it would serve no purpose to pass on either of these contentions because the ballots were afterward counted by the court, and if they were properly received in evidence and the result properly reached by the court, the legality of the action of the committee conducting the recount is unimportant. Obviously the jurisdiction of the court could in no way be affected by any action of either the convention or its committee.

For the purpose of this opinion we shall assume, without deciding, that the office of attorney of the Alliance is an office within the provisions of the quo warranto act.

Where an information is filed in a quo warranto proceeding

no proof or evidence is necessary to support it, but the duty is thrown upon the party whose right to exercise certain functions is questioned, to show legal authority for holding and exercising them. People v. Andrews, 2[illegible] Ill. App. 479; Garms v. People, 108 Ill. App. 631; People v. Keechler, 194 Ill. 235; People v. Hartquist, 311 Ill. 127.

In the Andrews case the court said (p. 481): "Pleadings in quo warranto cases are governed by the same rules that prevail in other civil actions. (Citing cases.) The general rule is that the defendant must either disclaim or justify. If he justified he must set out his title specially and show a valid title to the office. The People are not bound to show anything. He must exhibit authority for exercising the functions of the office or the People will be entitled to judgment of ouster. (Clark v. People, 15 Ill. 213, 217; Carrico v. People, 1[illegible]3 Ill. 198; Catlett v. People, 151 Ill. 16; Place v. People, 192 Ill. 160; People v. Keechler, 194 Ill. 235, 238; People v. Central Union Tel. Co., 232 Ill. 260, 271; People v. Baldridge, 267 Ill. 190."

In the instant case the burden was upon the respondent to prove that she was entitled to the office of attorney for the Alliance. On the hearing she assumed this burden and offered in evidence the original ballots, and if they were properly received in evidence over the relator's objection, there is no contention, as we understand the argument, that the trial Judge did not reach the right result. But the relator contends that the evidence fails to show the ballots were properly preserved and that they were therefore inadmissible.

In a proceeding to contest an election of public officials, Rogers v. Meade, 363 Ill. 630, the court in announcing the rule of law as to when the original ballots were properly preserved and

admissible in evidence, said (p. 637): "The returns of the judges and clerks are prima facie evidence of the result of the election, but the ballots are the original evidence of the votes cast and in case of contest are better evidence of the result if they have been preserved in the manner prescribed by the statute. (Talbott v. Thompson, 350 Ill. 86; Graham v. Peters, 248 id. 50.) Conversely, if the evidence discloses that the ballots were exposed to the reach of unauthorized persons, and the returns are not discredited, the ballots will not be regarded as better evidence of the result of the election. (Talbott v. Thompson, supra; Bolton v. Whalen, 350 Ill. 50.) The question of whether the ballots have been properly preserved is in each action necessarily one of fact, to be determined by the evidence. (Bullman v. Cooper, 362 Ill. 469; Sibley v. Staiger, 347 id. 288.)"

In Alexander v. Shaw, 344 Ill. 389, which was an action to contest an election, the court said (p. 395): "If there is no evidence casting discredit upon the returns and there is evidence showing that the ballots were not properly preserved but were so kept that they might be reached by unauthorized persons they are not to be regarded as better evidence than the returns."

In the instant case there is evidence tending to cast discredit upon the returns as made to the convention by the election committee. When the committee presented its report, the respondent objected that the result announced by the committee was incorrect, as stated by watchers who were present at the time the ballots were being counted.

The question for decision remains, however, and it is, Does the evidence show that the "ballots were not properly preserved but were so kept that they might be reached by unauthorized persons"? The trial court found in effect that the ballots were

admissibility of evidence, said in, [illegible]: "[illegible] the jurors and others are [illegible] influence [illegible] of the [illegible], but the ballots are the original evidence of [illegible] and in case of [illegible] of the [illegible] evidence of [illegible] have been presented if the number presented by [illegible]. (People v. Thompson, 27 Ill. App. 43; People v. Kelly, 24 [illegible] App. 1.) [illegible] vacatur, if the evidence [illegible] the ballots were [illegible] to the [illegible] of [illegible] causes, and the [illegible] not discredited, the ballots will not be [illegible] as [illegible] evidence of the result of the [illegible]. (People v. Thompson, supra; Peters v. Peters, 58 Ill. App. 1[illegible] [illegible].) The [illegible] of [illegible] the ballots were [illegible] properly preserved [illegible] case [illegible] unassailability one of fact, to be [illegible] by the [illegible]. (People v. Hunter, 268 Ill. 268; Miller v. Stanton, 247 Ill. [illegible].)

In Alexander v. Shaw, 358 Ill. 328, [illegible] the [illegible] of action [illegible] concerned an [illegible], our court said (p. 334): "If there is no evidence casting [illegible] upon the returns, we have [illegible] showing that the ballots were not properly preserved but that [illegible] fact that they [illegible] to be tampered [illegible] [illegible] not to be [illegible] greater evidence than the returns."

In the instant case there is evidence tending to cast discredit upon the returns as made [illegible] by the judges of election. When the committee presented its report, the respondent objected that the result announced by the committee was incorrect, as stated by witnesses who were present at the time the ballots were being counted.

The question for decision remains, however, and it is, Does the evidence show that the "ballots were not properly preserved and were so kept that they might be tampered by unauthorized persons"? The trial court found in effect that the ballots were

properly preserved and were therefore admissible in evidence, and, as stated in Rogers v. Mead, 363 Ill. 556, "the question of whether the ballots have been properly preserved is in each action necessarily one of fact, to be determined by the evidence," and unless we can say that the finding of the trial Judge is against the manifest weight of the evidence we are not warranted under the law in disturbing his decision.

There is evidence in the record from which the court might find that the ballots were presented to the convention by the election committee and the result announced; they were then turned over to the convention and came into possession of the chairman of the convention; that shortly thereafter the convention adjourned and the chairman took the ballots to the offices of the Alliance which were in the same building where the convention was held, placed them in a filing cabinet for which she had a key; that she locked the cabinet and afterward locked the door to the offices; this was early Sunday morning, September 29; that on Monday morning when the committee was to recount the ballots the chairman went to the offices of the Alliance, unlocked the cabinet in which she had placed the ballots the day before, found them in the same condition; that after they were recounted by the committee they were again sealed up and later presented to the court. There is some evidence to the effect that there were a number of keys to the filing cabinet in which the ballots were placed held by other persons, and other evidence that might tend to show that the ballots were exposed to the reach of unauthorized persons, but we think it was of such a character as would warrant the trial Judge in holding that the ballots were properly preserved.

Upon a careful consideration of all the evidence in the record, some of which we have not attempted to analyze, we are clear that we would not be warranted in holding that the finding

of the trial Judge, who saw and heard the witnesses testify, to the effect that the ballots were properly preserved, is against the manifest weight of the evidence.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

39189

HARRY J. DIACOU,
Appellee,

vs.

FRED A. SNOW, GEORGE J. O'MALLEY.

GEORGE J. O'MALLEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 5, 1935, plaintiff brought an action of trover against Fred A. Snow to recover the value of an automobile which plaintiff alleged he lost on June 27, 1931, placing his damages at $500. Snow filed an affidavit of merits denying liability and averring that on June 27, 1931, he bought the automobile for $55, and that it was sold by a constable under a judgment order entered by the justice of the peace. More than a year thereafter, June 18, 1936, plaintiff filed his verified petition in which he alleged that all the evidence had been heard but that the court had not made his findings or entered judgment; that during the trial it appeared that George J. O'Malley, as well as Snow, converted and disposed of the automobile, and the prayer of the petition was to make O'Malley an additional party and for leave to file an additional count, and that summons issue against O'Malley; that by making O'Malley an additional party defendant would "not necessitate a new hearing of the evidence due to the fact that he was present during the hearing of evidence on June 5, 1936, and testified fully concerning his part in the matter in controversy." An order was entered on the same day giving plaintiff leave to file an amendment to his statement of claim; O'Malley was made an additional party defendant, summons issued, and the cause was continued to July 1, 1936.

On the same day, June 18, 1936, plaintiff filed what he designates an amendment to his statement of claim, which is in the

[illegible]

[illegible],

vs.

[illegible] A. [illegible], [illegible] d. [illegible].

[illegible]

[illegible]

[illegible]

form of a separate count against defendant O'Malley; on June 23 there appears an amended praecipe and statement of claim filed by plaintiff against Snow and O'Malley, in which the two counts in trover appear, one against Snow and the other against O'Malley. June 23 summons issued against O'Malley returnable July 1, and he was served by the bailiff. June 29 O'Malley filed his appearance and a demand for a trial by jury of six, also his affidavit of merits in which he denied liability and averred that on August 1, 1929, he was appointed receiver by the Circuit court of Cook county in a suit there pending involving certain premises in Riverside, Illinois, and as receiver he was ordered to collect the rents, issues and profits of certain property; that he found the automobile in the garage at the premises; that plaintiff failed and neglected to move it or to pay the rent for the use of the garage, and on February 26, 1931, upon due notice given plaintiff, the Circuit court entered an order authorizing O'Malley as receiver to take steps by way of attachment to collect the rent from plaintiff for the use of the garage for August, September, October, November and December, 1930, and January and February, 1931; that pursuant to the order he brought suit against plaintiff before a justice of the peace in Riverside and attached the automobile; thereafter judgment was entered in his favor by the justice of the peace; that he sold the automobile under the execution and accounted to the Circuit court for the proceeds of the sale, and thereafter, on January 25, 1932, was discharged as receiver; on information and belief O'Malley alleged that he believed plaintiff had notice of the proceeding before the justice of the peace but failed to defend.

On July 1, the date to which the case had been postponed, when the summons against O'Malley was ordered issued, a judgment order appears in the record which recites that the cause came on for hearing without a jury as to defendant Snow, and "by order of

court trial ex parte as to defendant, George J. O'Malley"; that the court heard the evidence and found the issues against both defendants and assessed plaintiff's damages at $300.

On July 20, 1936, O'Malley, upon notice to plaintiff, moved to vacate the judgment entered against him and to have the case assigned and placed on the jury calendar for trial by a jury of six, and in support of the motion filed an affidavit of defendant O'Malley and the affidavit of his attorney, setting up that when the jury demand was filed by O'Malley, as above stated, the clerk of the court said the case would then automatically go on the jury calendar, and for this reason they did not appear on July 1. The motion on July 28 was denied, and O'Malley prosecutes this appeal.

Plaintiff has filed no brief in this court. The proceeding followed in the instant case was contrary to law and to Rule 167 of the Municipal court. O'Malley was entitled to have his case tried by a jury and the judgment as to him must be reversed and the cause remanded. Obviously this does not disturb the judgment against Snow. Adkins v. Strathmore Co., 278 Ill. App. 183; Fogel v. 1324 N. Clark St. Bldg. Corp., 278 Ill. App. 286; Spelina v. Sporry, 279 Ill. App. 376.

The judgment of the Municipal court of Chicago as to defendant O'Malley is reversed and the cause remanded as to him.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

[illegible]

39200

7

JULIUS BROWDY,
Appellant,

vs.

JULIAN BLACK,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

289 I.A. 610[4]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Julius Browdy filed a complaint in equity against Julian Black and a number of other persons who were later dismissed out of the case. Afterward plaintiff filed his third amended complaint, the two prior complaints having theretofore been stricken on defendant's motion. The prayer of the third amended complaint was that defendant, Black, be required to account for profits made which belonged to the partnership theretofore existing between plaintiff and defendant.

Defendant filed his written motion to strike the third amended complaint specifying 48 grounds. The court overruled the motion as to 47 of the points but sustained it as to one, which was that plaintiff had not attached to the complaint a copy of the alleged agreement between him and defendant. Afterward plaintiff amended his complaint by alleging that the contract between the parties was oral. A few weeks thereafter defendant demanded that plaintiff file a bill of particulars. The demand consisted of 57 questions, and in compliance therewith plaintiff on March 27 filed a verified bill of particulars in which he answered the questions. April 2 defendant filed a written motion to dismiss the suit on a number of specified grounds which were based on the answers made by plaintiff in his bill of particulars, and defendant supported his written motion by an affidavit. The motion was allowed, the suit dismissed at plaintiff's costs, and he appeals.

Counsel for plaintiff in their brief say that the third amended complaint "charged that for a period of more than five years immediately prior to July 7, 1934, the plaintiff and defendant were equal copartners under an oral copartnership agreement and had been engaged in conducting a cigar store, restaurant and cafe, and also from time to time from the earnings of said business purchased certain stocks and bonds, and that on July 7, 1934, the partnership had assets to the amount of $9000 in cash and certain stocks and bonds;" that John Roxborough made an oral agreement in the city of Detroit with Joseph Louis Barrow, generally known as Joe Louis, by which he agreed to advance money to Louis for expenses in training as a professional boxer; that in consideration of such advances Louis agreed to give Roxborough one-third of the profits earned by Louis from boxing, stage appearances and advertising; that afterward Roxborough entered into an oral agreement with defendant, Black, whereby Black was to furnish the money needed by Louis in his training, and in consideration, Roxborough assigned one-half of his interest in his contract with Louis to Black; that defendant, Black, in carrying out his agreement with Roxborough used $9000 of the funds belonging to the copartnership between plaintiff and defendant; that Black made profits out of the contract with Roxborough in excess of $50,000, and plaintiff seeks to recover one-half of these profits.

Plaintiff in one of his answers (set up in his verified bill of particulars) states: "the cigar store, restaurant and cafe were operated with losses and consequently abandoned by mutual agreement of the parties." And further, in response to questions as to what kind of business he and plaintiff were engaged in on July 7, 1934, answered that the business was the

[illegible]

"operation of two policy wheels located at 70 East 28th street, Chicago, Illinois. *** known as EAST & WEST and NORTH & SOUTH."

Defendant's motion to dismiss the suit as above stated, was supported by an affidavit of Theodore Robinson, who in his affidavit apparently qualifies as an expert; he swears that "policy wheel" is a well known term for a gambling machine or device used for wagering money, such game being commonly known as "policy."

Plaintiff contends the court erred in going beyond the face of his third amended complaint in passing on defendant's motion to dismiss the suit, apparently on the theory that a bill of particulars could not be considered on the hearing of such motion, but no authority is cited. We think there is no merit in the contention. Prior to the going into effect of the present Practice Act January 1, 1934, it was held that a bill of particulars was a part of the declaration. Sterling Midland Co. v. Ready & Callaghan Co., 236 Ill. App. 403. In that case the court said (p. 407): "The bill of particulars filed by the plaintiff specifically defined the claim of the plaintiff. In the case of McKinnie v. Lane, 230 Ill. 544, the court said (p. 548): 'The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of the particular cause or causes of action therein mentioned.'" The court then discusses the case of McDonald v. People, 126 Ill. 150, and continuing said, "In the case of O'Leary v. People, 88 Ill. App. 60, 64, the court held that a bill of particulars is part of the declaration, plea or notice to which it relates. The following cases also hold that a bill of particulars is part of the pleadings: Snyder v. Phare, 25 Ind. 398, 402; Benedict v. Swain, 43 N. H. 33, 34; Attrill v. Patterson, 58 Md. 226, 236, 239;

Starkweather v. Kittle, 17 Wend. (N. Y.) 20."

In the instant case counsel for plaintiff in their brief, from which we have above quoted, say that the partnership between him and defendant was engaged in conducting a cigar store, restaurant and cafe, and that from the earnings of such business the partnership purchased stocks and bonds, and that it was from such assets that defendant wrongfully took the $9000. But in his bill of particulars he swears that the partnership lost money in the operation of the cigar store, restaurant and cafe, and since, under the rule of law announced in the authorities above cited, plaintiff would be confined in his proof to the matters set up in his bill of particulars, he could not maintain his suit, because instead of making a profit from the operation of such business losses were sustained. And since plaintiff swears in his bill of particulars that the other business in which he and defendant were engaged as copartners was the operation of policy wheels, and since it appears that the operation of such were gambling transactions and illegal, the court will not allow plaintiff to enforce an accounting for illegal profits.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

[illegible]

[illegible]

[illegible]

39210

8

ANNA M. HINTZ,
Appellee,

vs.

RIDGEWOOD CEMETERY COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

289 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in equity against the defendant praying that a contract entered into by the parties for the purchase of two lots in defendant's cemetery be declared null and void, for an accounting, and for the return of the purchase price, $1200. The case was referred to a master in chancery who took the evidence, made up his report and recommended a decree in accordance with the prayer of the complaint. Afterward a decree was entered substantially in compliance with the recommendation of the master except that plaintiff was awarded the $1200 with interest, and defendant appeals.

The record discloses that plaintiff owned and was developing a cemetery and had employed Henry C. Lonsford to sell certain lots in the cemetery. Lonsford employed salesmen and in September, 1923, they negotiated with plaintiff for the sale of two lots. A contract was entered into between plaintiff and defendant whereby plaintiff agreed to pay $1200, the payments to extend over a considerable period of time. Plaintiff made the last payment in September, 1923, and at that time defendant tendered a deed to plaintiff for the two lots. The tender was refused on the ground that prior to the time she entered into the contract for the purchase of the two lots it was represented to her by the salesmen and by two of the directors of defendant corporation, one of whom was the then president, that the several sections into which the cemetery

was divided, would have a parkway around each section forty feet in depth, which was to be used for landscaping purposes and that the lots in the rear of such parkway would be used only for graves. Defendant disputed this contention and stated that there were two rows of lots around each section and that they were to be sold for graves the same as the rest of the sections.

Plaintiff testified in her own behalf and produced a number of witnesses who gave testimony tending to sustain her contention, as above stated. The two salesmen employed by Lonsford were not available and did not testify, and one of the directors of defendant company and the then president, Mr. Hanson, had died before the trial. But defendant offered witnesses who gave testimony that it was always the purpose of the defendant to sell the two rows of lots around each section for burial purposes. The written contract between Henry C. Lonsford and defendant expressly excluded the two rows or "road" lots from sale by Lonsford.

The evidence further shows that at the time of the negotiations for the sale of the lots, the salesmen delivered a map or plat of the cemetery which shows each of the sections, including the forty feet, divided into lots. A number of photographs are in the record as well as the testimony of witnesses, all of which shows that a tier of two lots extends around each section which is 42 feet, as well as two walkways, making a total of about fifty feet; that these strips were planted with trees and shrubbery; that plaintiff's lots were immediately behind the strip in section 3. And, as stated, plaintiff's evidence was to the effect that it was represented to her that this forty or fifty feet space was to be permanently retained for parkway purposes and not for burial purposes. About the time plaintiff made her final payment in September, 1928, she learned that these

strips around each section were to be used for burial purposes and that some of the lots were then being sold and used for such purpose. Upon learning this fact she refused to accept the deed and demanded the return of her money.

The master found that there was no evidence denying the representations testified to by plaintiff to have been made by the two salesmen and by the director of defendant, and further, "That the defendant offered no evidence to the effect that the plaintiff had knowledge prior to the time she made her final payment of the fact that burial lots were being sold in the 40 foot space around each section, which plaintiff had been advised was to be a perpetual parkway."

Defendant contends that the plaintiff misunderstood the meaning of the word "parkway" used by the salesmen when they were soliciting her for the purchase of the lots, but that if it be found that what the salesmen stated to plaintiff was not entirely true the statements "were not of existing facts but related to the alleged future intention of the defendant and cannot be the basis of fraud," and that plaintiff's testimony and her evidence are incredible and unworthy of belief in view of all the facts in the case.

We will not stop to consider the various definitions of "parkway" as given by counsel for defendant because the testimony of plaintiff and others is to the effect that it was represented to plaintiff prior to the purchase of the lots that the two rows of lots around each section would not be used for burial purposes but for landscaping to make the cemetery beautiful, and that graves would be placed behind the trees and shrubbery that were in those forty odd feet.

If plaintiff's version is to be believed, and there is

ative owners; such sections were to be used for burial purposes and that some of the lots were then being sold and used for such purposes. Upon learning this fact defendant refused to accept the deed and demanded the return of her money.

The master found that there was no evidence showing the representations testified to by plaintiff to have been made by the two salesmen and by the director of defendant, and finding, "that the defendant offered no evidence to the effect that the plaintiff had knowledge prior to the time she made her final payment of the fact that burial lots were sold in the 40 foot space around each section, which plaintiff had been assured was to be a perpetual driveway."

Defendant contends that the plaintiff misunderstood the meaning of the word "driveway" used by the salesmen when they were soliciting her for the purchase of the lots, and that if it be found that the salesmen asked to plaintiff was not sufficiently true the statements "were not of existing fact but related to the alleged future intention of the individual and cannot be the basis of fraud," and that plaintiff's testimony and her evidence are incredible and unworthy of belief in view of all the facts in the case.

We will not stop to consider the various definitions of "driveway" as given by counsel for defendant because the testimony of plaintiff and others is to the effect that it was represented to plaintiff prior to the purchase of the lots that the rows of lots around each section would not be used for burial purposes but for landscaping to make the cemetery beautiful, and that graves would be placed behind the trees and shrubbery that were in those forty odd feet.

If plaintiff's version is to be believed, and there is

the testimony of a number of witnesses which tends to sustain her, the representation made to her was one of fact and not of some future intention of the cemetery company.

Defendant further contends that an examination of the plat of the cemetery, which was submitted to plaintiff before she entered into the contract for the purchase of the two lots, discloses the fact that if plaintiff's version is true, practically one-half of the cemetery would be devoted to landscaping purposes and only the other half to burial purposes, and that such a contention could not seriously be made by any person.

We have carefully considered all the evidence in the record, and while there is considerable force in this last contention made by defendant, we think we would not be warranted in saying that the finding of the master, approved as it was by the chancellor, is not sustained by the preponderance of the evidence. The question for decision was one of fact and we cannot say that the finding was not warranted by the evidence.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

39028

12

ROSS D. NETHERTON et al.,
Appellees,

vs.

VIVID, INC.,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This suit was begun in equity by McKenna and Netherton to compel the specific performance on the part of defendant, Vivid, Inc., of an agreement to convey certain stock in the Vivid company and pay to the plaintiffs certain sums of money as agreed. The bill was filed July 17, 1933, and alleged the employment of plaintiffs by defendant on or about October 1, 1931, by its then president, Flanigan, to find an organization financially able and willing to enter into an agreement with Vivid, either for additional capital or for the purchasing or leasing of its business and rights under certain patents, for which defendant agreed to pay reasonable compensation; that on or about that time plaintiffs began negotiations with L. C. Smith and Corona Typewriters, Inc., of New York, and that after spending several months time, on or about April 9, 1932, an agreement was consummated between the defendant and the Smith-Corona company, under which Smith-Corona purchased the entire machinery and other factory equipment of defendant, and its entire inventories of duplicating machines and supplies. Under the same agreement Vivid granted to Smith-Corona the sole and exclusive license under its patents and applications therefor, for which Smith-Corona agreed to pay defendant a royalty of 5% of the entire net sales of all new duplicating machines and rolls; that Smith-Corona agreed to pay for the entire inventory of duplicating machines, etc., of defendant in cash

within 30 days after the contract; that on March 25, 1932, defendant, by Flanigan, offered and agreed to pay plaintiffs for the fair and reasonable value of their services $5000 each out of the first moneys received from Smith-Corona, together with 375 shares of the no par value capital stock of Vivid to each of the complainants, the certificates to be delivered immediately after the execution of the contract; and further to pay plaintiff Netherton $5000 on account of legal services rendered by him up to the time of consummation of the contract. Plaintiffs agreed to accept this offer. March 25, 1932, a special meeting of the stockholders of defendant was held pursuant to notice, at which nearly all the stockholders of defendant were present either in person or by proxy, when a resolution reciting the valuable services of plaintiffs to the corporation and directing and authorizing the directors and officers of defendant to carry out this settlement, thereby ratifying and confirming the agreement, was passed. June 2, 1932, Smith-Corona paid defendant approximately $45,000 and has since paid other large sums as royalty; that defendant paid to plaintiff McKenna $3000, and that there is a balance due of $2000; that defendant paid to plaintiff Netherton $5500 and there was a balance due him of $4500, on account of his legal services, but defendant refused to make further payments or deliver the stock; that the refusal was vexatious and unreasonable; that complainants are entitled to payment with interest at 5% from April 9, 1932; that all the issued capital stock of defendant is owned by a small number of persons and there is no open market in which it may be purchased. The value thereof cannot be easily ascertained other than from defendant; that its value depends upon the performance by Smith-Corona of its contract; and the damage to plaintiffs by defendant's breach cannot be accurately ascertained; that defendant ought

therefore to be compelled to specifically perform. The bill prayed accordingly. Flanigan was made a party defendant.

Vivid answered admitting that it desired to enter into negotiations for the lease or sale of its patents and rights, but denied that plaintiffs or either of them had been employed to find a business organization able and willing to enter into an agreement with defendant; denied that it agreed to pay plaintiffs or either of them any compensation therefor, except that Flanigan alleged that he with other stockholders of defendant on May 22, 1931, entered into an option contract with plaintiff McKenna by which McKenna was to have a 60 day option to purchase all the stock of Vivid for $1,000,000; that this option was given in order to permit McKenna to negotiate with one Walker, and through Walker with the International Business Machines Corporation; that Netherton was employed by McKenna at McKenna's own expense and not by defendant. McKenna did not exercise his option which expired by its terms and was never renewed. Defendants admitted Netherton was licensed to practice law but denied making a contract with him for legal services as alleged; denied that as a result of the efforts of plaintiffs the agreement of April 9, 1932, was consummated between defendant and Smith-Corona, but said that such an agreement was in fact made on that date, which was negotiated by Flanigan and one McNally for defendant and by Dean Babbitt and Fowler Manning for Smith-Corona, and that the complainants in no way participated in the negotiations leading up to the contract.

Defendant admitted the receipt of $45,000 subsequent to April 9, 1932, and other sums for royalty; admitted that Netherton advised defendant during negotiations as its attorney, but say it was not in accordance with the terms of any supposed agreement with Netherton and McKenna, and denies that plaintiffs were entitled to any sums other than Netherton, who was entitled to reasonable

compensation for legal services. The answer also denied that any agreement was made March 25, 1932, to pay Netherton and McKenna $5000 each or to issue to them 375 shares each of defendant's common capital stock without par value, or that they agreed to pay Netherton $5000 for legal services. The answer admits a special meeting of defendant's stockholders was held March 25, 1932, that a resolution was passed substantially as alleged, but denies that the resolution had any binding force or effect; that the special stockholders' meeting was called for the purpose of authorizing the board of directors of Vivid in general terms to enter into a contract, but that the stockholders of defendant company had no right, power or authority to enter into or ratify any contracts with complainants, and aver that at no time did the board of directors of defendant ratify, approve or affirm the resolution or consent to be bound by it; that the resolutions in question were drafted by Netherton; that when they came up for the stockholders Netherton stated that unless these resolutions were passed he would block and prevent the execution of any contract between Vivid and Smith-Corona and walked out of the meeting; that on that date no contract had been entered into between Vivid and Smith-Corona, and the officers and stockholders of Vivid feared that Netherton had the power to block and prevent the execution of the contract and would do so if the resolutions were not adopted, and in such belief the stockholders permitted the adoption of the resolution. There was then a disastrous business depression in the United States. Defendant was heavily indebted and defendant believed that if the demands of plaintiffs were resisted the contract with Smith-Corona might be defeated and the financial stability of Vivid endangered; that the resolution was extorted from the stockholders by threats and duress of plaintiffs.

The answer admits that on June 2, 1932, defendant paid

McKenna $3,000, but says the same was paid under threat of Netherton unless payment was made the contract with Smith-Corona would be blocked. At that time the contract had been carried out in part only, and there were still many ways in which Netherton could carry out his threats to block the deal. The answer also admits that on June 2, 1932, $5500 was paid by defendant to Netherton, and alleged that it was paid by reason of similar threats. The answer admits that defendant has refused to issue the 375 shares of common stock to either of plaintiffs; that there is no open market in which it can be purchased. The stock of defendant corporation is held by 28 persons. The answer also averred the contract could not be performed by reason of the failure of defendant's board of directors to pass a resolution fixing the consideration for which the stock might be issued. The answer denies that plaintiffs are entitled to the relief as prayed.

The cause was referred to a special commissioner who reported finding the equities with the plaintiffs, overruled objections filed to his report, and the chancellor also overruling exceptions thereto by defendant, on May 14, 1936, entered a decree sustaining the findings of the special commissioner and decreed that McKenna recover $2000 with interest from May 6, 1932, at 5%, amounting to $2401.89, and have judgment therefor; that Netherton recover $4500 with interest at 5% from May 6, 1932, and have judgment for $5404.34, and that within five days from the date of the decree, defendant (through its duly authorized officers) should issue and deliver to McKenna a certificate for 375 shares of the common capital stock of no par value of defendant corporation, fully paid and non-assessable; and that similarly it should issue and deliver to Netherton a like certificate.

The cause as to John J. Flanigan was dismissed and the court retained jurisdiction for the purpose of enforcing the decree.

The record in this case is voluminous, containing almost 2000 pages with 126 exhibits.

Defendant urges that the decree should be reversed because, they say, plaintiffs are in court with unclean hands; that the alleged contract, by reason of the fiduciary relations of plaintiffs to defendant corporation, is presumptively fraudulent, being secured by threats of Netherton as attorney while the work was in progress; that plaintiffs are not entitled to specific performance because the contract was not fair nor free from oppression nor made for an adequate consideration; that the agreement to issue no par stock was void because the board of directors had not by resolution fixed the money consideration for which the stock should be issued; that a court of equity will not direct a board of directors, who is not a party defendant, to exercise its discretion in evaluating the stock, and that so to do would violate the pre-emptive rights of other stockholders; that since there was no basis for specific performance of the contract, the court of equity was without jurisdiction to give other relief, and that the court erred in allowing plaintiffs interest upon the amounts found to be due to them. Also, the defendant complains in this court for the first time that fees allowed to the special commissioner were excessive.

In summary, the facts found by the master are that on October 1, 1931, defendant was an Illinois corporation, engaged in the manufacture and sale of duplicating machines, equipment, etc. The corporation desired and very much needed additional capital. The great depression was under way, and if additional capital could not be obtained it was desired to lease or sell certain of defendant's patents. John J. Flanigan was the president of defendant corporation; Robert P. Quinlan its secretary and treasurer, and Flanigan, Frank P. Lavin, Edward E. McNally and John J. O'Leary,

with Quinlan, constituted the board of directors.

Plaintiff McKenna lived in Wisconsin, was a real estate dealer and a close friend of Flanigan; Netherton, an attorney and friend of McKenna. McKenna also was a stockholder in the corporation. Netherton acted as the attorney at the organization of the defendant corporation on September 30, 1927. Its capital stock consisted of 500 shares preferred and 10,000 shares of common stock without par value. The original certificate shows that Quinlan subscribed for 998 shares of this common stock; P. C. Griffins and Frank P. Lavin 1 share each. McKenna and Netherton were employed to secure the new capital desired, and on May 22, 1931, to that end McKenna was given an option to buy the capital stock. If the plan was successful, it had been agreed that McKenna and Netherton should each receive compensation to the amount of $50,000. No deal, however, resulted. Later in the year McKenna, Netherton and Flanigan had conversations and correspondence about a contact that Netherton had with business prospects in New York. Netherton, representing defendant, opened up negotiations with Dean Babbitt, representing the L. C. Smith-Corona Typewriter Company. As the negotiations progressed during the fall and winter of 1931 and the spring of 1932, the question of a definite agreement between defendant and McKenna and Netherton as to the compensation to be paid to them in case the negotiations were successful was considered. October 26, 1931, Flanigan wrote McKenna that he told Netherton that the deal was still in the hands of McKenna, and that Netherton was simply to act as contact man. Flanigan was informed at that time of the contact of Netherton with Dean Babbitt. After various negotiations an agreement was executed and signed by defendant and the Smith-Corona company on April 6, 1932. The master finds that the agreement was consummated through the efforts and

services of Netherton as contact man for McKenna, who was in charge of the deal at the direction of Flanigan as president of the defendant; that Netherton and Flanigan reached an understanding that $5000 in cash and 375 shares of stock was reasonable compensation for the services of Netherton in promoting the deal, and that $5000 was a reasonable compensation for the legal services of Netherton. March 25, 1932, Flanigan and actually representing defendant, and McKenna and Netherton had a conversation about the compensation for services, and reached an agreement which was put in the form of a resolution prepared by Netherton and which was submitted to a meeting of the shareholders of Vivid and was unanimously adopted by them, as set up in the bill. The master found that while the resolution might not be binding on the corporation, it served as a distinct proposition and consummation of the negotiations for the amount of compensation and states to the officials of the corporation the compensation which was expected by McKenna and Netherton. After the adoption of the resolution the officials of the corporation continued to accept the services of McKenna and Netherton in completing the deal between defendant and Smith-Corona. The master also finds that defendant has already realized $94,000 in cash from royalties and from the price of its equipment and stock sold to the Smith-Corona. The master finds that the services rendered by McKenna and Netherton were at all times well known to Flanigan and were rendered at his request.

Notwithstanding the facts as found by the master and approved by the chancellor, the first contention of defendant is that plaintiffs should not be allowed to recover in a court of equity for the reason that they are in court with unclean hands, in that they had deliberately sworn falsely as to its material facts in issue. The specification on this point is that plain-

tiffs based their case on the theory that in July, 1931, Flanigan promised that the same contract would obtain with reference to the Smith-Corona as had existed in the International Business Machines deal. McKenna and Netherton both testified that Flanigan said to them that their compensation would be the same in the new deal as it was in the International deal, - $50,000 on the basis of $1,000,000 deal, and in proportion if the sale price was less; Netherton to get the same. Defendant says that such a promise was impossible since Flanigan at that time did not even know the name of the prospect; it also says that it is shown to be untrue by letters and documents, as for instance by McKenna's letter to Netherton of December 2, 1931, in which he said, "I would advise you to have an understanding as to our commission before going into this deal."

McKenna's letter of March 18, 1932, to Flanigan in which he bitterly complains of unfair treatment and of remarks made by Flanigan to him in his room at the hotel, "after I told you what I wanted as my commission"; Netherton's letter to McKenna of October 26, 1931, in which he said in part, "As I told you, nothing definite has been arranged with regard to your and my compensation if such an arrangement is put through." He says that if he is to look to the L. C. Smith company for his compensation, he would like to know it so he could make arrangements with them. Netherton's letter of February 1, 1932, to McKenna, in which he said it was essential that McKenna should come quickly and get everything straightened out with Flanigan, and that he wanted a definite and complete understanding before the end of the week. This point is so earnestly presented by defendant that we have given it careful consideration. We are satisfied, after reading the entire record, that the charge is wholly groundless. Assuming the conversation with Flanigan to be as McKenna and Netherton said it was, the

proposed deal with the Smith-Corona people, as it developed, became so different in its nature that such a conversation could not be construed to amount to more than a basis upon which to charge for plaintiffs' services upon a quantum meruit. As the sequel showed, there was every reason why the agreement as to the new deal with Smith-Corona should be made definite, complete and put in writing. The correspondence, rightly interpreted, means no more than this and is not at all inconsistent with a conversation, as testified to by plaintiffs. The charge of perjury is not justified on this record and should not have been made. The master apparently did not regard this alleged oral conversation as material, and we agree that it is not. The charge simply illustrates the bitterness with which this litigation has been conducted.

Defendant contends in the next place that Netherton and McKenna were fiduciaries of defendant, and that the transaction by which their compensation was fixed was, therefore, presumptively fraudulent and void. Defendant cites Commercial Merchants Bank v. Kloth, 360 Ill. 294, and Hagerman v. Schulte, 349 Ill. 11. While the cases announce an undoubted rule, we think they have no application here. Certainly not as to McKenna, who stood in no fiduciary relationship to defendant in so far as the negotiations with reference to the compensation which he was to receive was concerned. Netherton, it is true, had acted as attorney for defendant in some matters prior to the time when he was engaged with McKenna in matters connected with securing additional capital for defendant, but his services as attorney in those matters had been closed before the beginning of this promotion. It is true that in the course of his negotiations with the Smith-Corona people services of a legal nature were performed, but the evidence shows without contradiction that Flanigan and other officials of defendant corporation had full knowledge of the situation. All of the services were contingent

upon the procuring of the contract, and no one could have thought that Netherton was acting in a confidential relationship in taking measures to secure the payment of his own compensation. The rule which prevents an attorney from purchasing an interest in the subject matter of litigation from his client and makes any such deal on his part presumptively fraudulent has no application under circumstances such as here appear. That rule is intended to prevent fraud, not to assist debtors in evading their just obligations.

It is next alleged that the contract between plaintiffs and defendant was void because procured by threats while the work for which he claimed compensation was still in progress, and that it is void for that reason. Defendant cites Boyle v. Read, 138 Ill. 153; points out that Netherton began serving the corporation as attorney in 1927, conducted its defense in an important litigation which was in progress until June 8, 1931, and that in February, 1932, when this arrangement was made, he was engaged to draw the contract between Smith-Corona and defendant. It says that on March 15, 1932, and again on March 25, 1932, he demanded compensation under threat that if it was not paid he would block the deal, and that he was aided and abetted by McKenna. Defendant complains that he had a secret arrangement with Babbitt of Smith-Corona to prevent the deal going through until his commissions were provided for, and defendant says that under such circumstances an attorney is obligated to show the reasonable value of his services, and that as McKenna's position depends entirely upon Netherton, it is incumbent on both to show that Netherton's services were worth $15,000 and 750 shares of stock; that the record does not so show but is silent as to the actual value of Netherton's services. Defendant quotes at length from correspondence between Netherton and McKenna, which is in evidence, in which Netherton suggests that it is only good business to get a written assurance from

Flanigan, etc.

We are not impressed by these contentions. In the matter of promoting this deal and in the matters concerning which Netherton wrote McKenna, Netherton was not acting as the attorney for defendant but as the partner of McKenna in promoting the deal between defendant and Smith-Corona. It is true defendant employed Netherton to act in particular matters such as drawing the contract, etc., as its attorney. Whether it was wise for defendant so to employ him or he to accept the employment may be a question, but both parties acted with their eyes open. Netherton had every good reason to suspect, as the sequel shows, that an attempt might be made to beat both him and McKenna out of their commissions, and the observations of Netherton to McKenna have been abundantly justified by subsequent events. There is no proof in the record tending to show that Netherton did not give loyal and efficient service. It also appears that as a result of his endeavors the deal was closed and defendant corporation put in a financial situation perhaps as advantageous to it as if the original deal had gone through, in which the compensation would have been $50,000 each to the plaintiffs.

As the deal approached completion the suspicions entertained by Netherton as to the manner in which plaintiffs would be treated was confirmed. The only threat made was that he would withdraw from his connection with the matter. A careful consideration of all the evidence leads us to believe he would have been entirely justified in doing so.

The minutes of the stockholders meeting recite that a general discussion with regard to the compensation to be paid to Netherton and McKenna was had before it was voted upon. Two weeks later Flanigan wrote to Netherton a letter in which he addressed him as "Dear Ross" and enclosed a copy of the stockholders'

resolution of March 25, 1932. Defendant thereafter in the course of the deal furnished the Smith-Corona company a bulk sales affidavit in which it listed Netherton as a creditor for $10,000 and McKenna for $5000. A month later the corporation paid Netherton $5000 of the amount and McKenna $3000. Six months later Netherton was paid $500 more. Long prior to that time the contract between defendant and Smith-Corona had been fulfilled. This conduct of defendant's officials is wholly inconsistent with the idea that the agreement was the result of threats. If there was any element of that kind in the agreement as to compensation, then defendant did not within any reasonable time repudiate, but on the contrary continued to request and use the services of Netherton in the completion of the deal upon which its further financial stability depended. We think the charge is without any foundation in fact.

Defendant contends, citing many authorities, that the court should not have granted specific performance because the contract was not fair and free from oppression, and the consideration therefor inadequate. In view of the actual situation which we have recited, the needs of the corporation, the former definite agreement, the actual financial situation, we are not able to entertain a doubt that the contract here in question meets all requirements and is not subject to these objections. The whole record indicates that plaintiffs at a critical time and with much labor performed services for which, under all circumstances, the compensation allowed to them under the terms of the contract is comparatively small. We have given not only careful attention to the report of the master but have read the entire abstract, examined the exhibits and considered carefully the suggestions of counsel in the matter. The conclusion forced upon us by this examination of the record is that this defendant was willing to

accept these valuable and important services while using every legal subterfuge in order to avoid paying therefor. The defense, in our opinion, is purely vexatious.

Along this line is the contention made that the contract to issue this stock of no par value is void because the consideration for which it is to be issued has not been fixed by resolution of the board of directors of the defendant corporation. The contract was executed March 25, 1932. At that time the General Corporation act (in force July 1, 1919 - see Session Laws of 1921, page 965) was applicable. It is suggested by defendant that the agreement was void under section 32 of that act. (See Ill. Business Corporation Act Ann., page 519.) The corresponding section of the present Business Corporation act is found in Illinois State Bar Stats., 1935, chap. 32, sec. 17, pages 852-53.

Section 32 of the General Corporation act of 1919 provides:

"Subject to provisions of this section, the corporation may issue and sell its shares of stock having no par value from time to time for such consideration, not less than five nor more than one hundred dollars per share, as may be prescribed in the certificate of incorporation or as from time to time may be fixed by the Board of Directors, pursuant to authority conferred in such certificate."

The charter of the defendant corporation did not fix the consideration for which no par value common stock might be issued. The board of directors have not held any meeting at which they have fixed the express consideration for which the transfer of the 750 shares of no par value stock might be made. Defendants cite Triplex Shoe Co. v. Rice & Hutchins, 17 Del. Ch. 356, 152 Atl. 342, 72 A. L. R. 934, to the point that stock thus issued without a precedent valuation by a board of directors is void. That case was decided, however, under a statute essentially different from that of Illinois, and also under circumstances which were not at all similar to those which exist here. The case is not applicable.

We do not understand that the issue of this stock by defendant will make necessary an additional authorized capital structure. Defendant says:

"Complainants' suit is to compel Vivid to issue 750 shares of no par value stock. Vivid owned none of its own stock; it did have more than 750 shares of unissued stock authorized by its charter, which stock, under the Corporation Act of 1919, the board of directors had power to issue for money or money's worth for a consideration measured in dollars to be fixed by the board. Under the Corporation Act of 1919 this stock could be sold only for money or money's worth; it could not be given away or traded for blue sky. It was merely potential stock which the board of directors had power to sell at a price to be fixed in their sound discretion."

In Roberts & Schaefer Co. v. Emmerson, 315 Ill. 127, the Supreme court of this state, construing section 32 of the General Corporation act, said:

"As we construe the General Corporation act, the statement of incorporation may specify one or more of three types of authorized stock issues: (1) Par-value stock, whose par value must appear in the statement; (2) no-par value stock, upon which a value is prescribed in the certificate of incorporation; (3) no-par-value stock whose value 'from time to time may be fixed by the board of directors pursuant to authority conferred by such certificate.'"

As we understand the record the stock here to be issued to plaintiffs is of the third class above described. It will be noticed that the fixing of the price is not made a condition precedent to the transfer of the shares. The directors of the company may fix the value from time to time. We will not presume that the board of directors will fail to perform its duty in this respect whether that duty is viewed from the aspect of present or future creditors of the corporation under the trust fund theory; in relation to its effect on other stockholders who may have paid more for their stock; or from the standpoint of the public policy of the state.

The arm of a court of equity is not powerless in such a situation. The decree reserves jurisdiction necessary to its enforcement.

We do not understand that the power of a corporation to issue its stock in payment for services is questioned. The decisions hold that it has such power. Farwell v. Great Western Telegraph Co., 161 Ill. 522; Davenport v. Piano Implement Co., 7[illegible] Ill. App. 161. Ill. State Bar Stats. 1935, chap. 32, sec. 18, page 853; Ill. Business Corp. Act, Ann., sec. 18; Fletcher Cyclopedia Corporation, vol. 11, secs. 5155 and 5187; vol. 57 American Law Review, p. 233. That specific performance is a proper remedy for wrongful refusal to issue stock, see Fletcher Cyclopedia of Corp., vol. 11, sec. 5165, page 333.

As we see it, the duty of the board of directors of defendant corporation to fix a price does not in any way affect the rights of the parties to this proceeding at this time. After the stock is issued it will be the duty of the board of directors, under the statute, to pass a resolution fixing the price for which it was transferred and transmit the same to the proper authority. As already stated, the decree reserves jurisdiction in the court for the enforcement of it.

Since we have found plaintiffs were entitled to have the contract specifically performed, it will be unnecessary to discuss the point raised by defendant that the court of equity is without jurisdiction. The further contention of defendant that the decree erred in awarding interest need not, we think, be considered. We have already expressed our opinion that this defense is of a vexatious nature, and at any rate the awarding of interest in a court of equity depends on equitable considerations. Chicago Brick Co. v. McLester, 165 Ill. App. 114; Golden v. Cervenka, 278 Ill. 409; Duncan v. Dazey, 3[illegible] Ill. [illegible]. There was no reversible error in the amount of compensation awarded to the special commissioner.

The decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39193

13

TINA ORTGIESEN,
Plaintiff,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al.,
Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

On Appeal of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, E. G. SWANSON, R. J. PFORDRESHER and E. MERTENS, not individually but as a bondholders' protective committee, WILLIAM A. LOMAX, not individually but as trustee under trust No. 396, RAYMOND J. DOWNEY, as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILICI and JOHN REZZONICO,
Appellants.

TINA ORTGIESEN,
Plaintiff,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al.,
Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Gen.No. 39204

On separate appeals of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, and RAYMOND J. DOWNEY as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILICI and JOHN REZZONICO,
Appellants.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

These separate appeals have been consolidated for hearing in this court. The first appeal is from an order entered on June 23, 1936. The appeal from this order is taken by the Chicago Title and Trust Company, successor trustee, under a trust deed recorded as document No. 9645152. This order recites that upon the petition of Francis E. Cash and Morris Blank, attorneys for Tina Ortgiesen and Leus Sachs, bondholders, praying for allowance

of fees in consideration of services rendered to the estate, the answer of the Title and Trust Company, successor trustee, and the answer of Raymond J. Downey, trustee, the court being fully advised in the premises after a full hearing (the court being familiar with the services rendered by Cash and Blank to the estate as set forth in their petition) finds that the services were beneficial to the estate; that the answer of one Swanson to the petition should be stricken; that Cash and Blank, attorneys, be allowed as reasonable compensation as attorney's fees for services rendered the estate the sum of $900, which is directed to be paid to them by the Chicago Title and Trust Company, successor trustee, and taxed as costs against the Chicago Title and Trust Company, successor trustee, "herein to be paid out of the funds and proceeds of this estate."

The second appeal, docketed as 39204, is from an order entered July 23, 1936, upon petition of Cash and Blank, filed May 5, 1936, also for an allowance of attorney's fees. The petition sets up that Blank and Cash advanced $41.40 for costs and expenses, and that said costs and $900 for attorney's fees for services rendered to the estate of the receiver, making a total sum of $941.40, was due to them. The petition avers that prior orders entered on May 5, 1936, and June 23, 1936, constituted final decrees and prays that these orders may be made a prior lien against the property involved in the receivership proceedings. August 1, 1936, the court entered an order upon this petition that the receiver pay to the petitioners said $941.40 in accordance with the prayer of the petition, and the court finding that the receiver had on hand sufficient funds, and that the sum of $941.40 theretofore entered therein had been taxed as costs in the estate; that the taxing of the said costs in the sum of

$941.40 constituted final decrees in the proceeding, it was therefore ordered that McCarthy, the receiver, be directed to pay to Francis E. Cash and Morris Blank $941.40 out of the rents, issues, profits and proceeds of the estate within ten days from that date, upon their executing and delivering to him and the Chicago Title and Trust Company, successor trustee, their receipt and release of all claims in and to said sum. From this order the Chicago Title and Trust Company and Raymond J. Downey, as trustee under a trust agreement dated May 10, 1935, appealed. No report of proceedings supports either order. The record indicates affirmatively that no evidence was taken. The sole ground upon which these orders were entered appears from the records and proceedings of the court and knowledge of the chancellor based thereon. The facts summarized would seem to be as follows:

April 25, 1927, Isaac Schor and others executed 375 bonds for the total sum of $117,500, together with a trust deed to the Madison & Kedzie State Bank, as trustee, securing payment of the bonds. The property mortgaged consisted of a plot of ground improved with a three story brick building, containing three stores and thirty-five furnished apartments, located on the northeast corner of Lorel avenue and Madison street, Chicago. The property has had an average gross income of about $17,000 a year. Fourteen months later the owners conveyed the premises to Louis Scacchi and Johanna Scacchi, who took subject to the indebtedness. By various conveyances, all subject to this indebtedness, the title was finally vested in Raymond J. Downey as trustee. Payments were made on account of principal and interest so that the principal indebtedness was reduced to $102,500.

November 24, 1931, defendants Swanson, Pfordresher and Martens, designating themselves a protective committee for this issue of bonds under a deposit agreement of the same date, actively

began the solicitation of the deposit of bonds. Subsequently, on September 1, 1932, an assignment of rents was executed to the committee by the owners of the property. This committee thereafter had full charge and control of the property, although the owners remained in possession, collected rents and paid bills.

January 25, 1932, the receiver of the Madison & Kedzie State Bank executed its resignation as trustee, and by an instrument of the same date, the Chicago Title and Trust Company accepted said trust as successor trustee. Defaults then existed in payments due on interest and principal under the terms of the trust deed. However, the successor trustee did not file a foreclosure suit nor take possession of the premises. April 25, 1934, the last bonds of this issue matured by their terms. May 17, 1935, the protective committee entered into an agreement with Raymond J. Downey, trustee, for the owners of the equity, under the terms of which the property was to be operated by the committee and Downey for ten years. The agreement in part provided that there was in the hands of the committee $5066.27 derived from the income of the property; that the committee was entitled to take fees of $3331 (3½% of $102,500) from this sum "for reorganization expense." It specially provided that during the ten year period the committee would receive 1½% of the gross monthly income or about $250 a year as a management fee, and a further service charge of $492 a year for the committee. Other provisions were that the owners were to occupy two apartments and receive $1050 a year for managing the premises.

February 15, 1934, attorney Cash wrote the successor trustee that he represented plaintiff Tina Ortgiesen, owning $2300 of the bonds. He asked that his letter be regarded as formal notice that his client demanded that the trustee proceed to take over the property under the powers conferred by the trust deed for the benefit of all the bondholders. February 23, 1934, the successor

trustee replied in effect that prior to this letter from the attorney no such request had been made, and called his attention to the fact that his letter made no offer of indemnity as required by the terms of the trust deed; it stated that his letter left the successor trustee in doubt as to whether it was requested to take possession or institute action to foreclose. The successor trustee requested the attorney to advise which, in order that it might be able to determine what indemnity would be asked. About March 14, 1934, the successor trustee requested the chairman of the bondholders protective committee to furnish it with a statement of account of all moneys that had come into the hands of the committee. The successor trustee received such statement and submitted it to attorney Cash under date of April 11, 1934. July 5, 1934, Cash presented to the bondholders protective committee bonds belonging to his client, and received her pro rata share of $81.36. These payments were endorsed on the bonds.

No further communication was made to the trustee until July 25, 1935, when Cash wrote demanding that foreclosure proceedings be instituted. The successor trustee again requested an account statement from the chairman of the bondholders protective committee, obtained it, and on August 25, 1935, submitted it to Cash, advising him that it was informed that taxes - with certain exceptions which were to be contested - had been paid; that the bondholders committee strongly felt that operation of the premises by the owner was the best operation that could be obtained; that under the terms of the trust deed action could be taken only at the discretion of the trustee; that unless there was some misapplication of the income or there was a possibility of selling the property for a substantial amount, it could not see any advantage in a foreclosure proceeding, but nevertheless asked that

the attorney examine the account statement enclosed, and thereafter consult with the trustee. August 29, 1935, the successor trustee received a letter from Cash advising that he regretted he had not received the letter of August 25th until August 27th, and that on August 26th he had filed a complaint on behalf of Tina Ortgiesen in the Circuit court as cause No. 35-C-13638. His letter, however, stated that possibly the parties might get together at a later date.

Thereafter plaintiff applied for the appointment of the receiver of the premises and for the rents held by the committee. The application for receiver was denied without prejudice. It is conceded by all the parties that the premises were insufficient security for the debt.

March 24, 1936, Lena Sachs, also an original holder and owner of $2000 of the bonds, by leave of court filed her intervening petition and was made a co-plaintiff.

May 5, 1936, after full hearing before the trial court, the testimony of witnesses for plaintiffs and defendant having been taken and a written stipulation of fact read to the court and introduced in evidence, an order was entered requiring and directing the successor trustee to file a suit to foreclose the trust deed, upon giving indemnity to the successor trustee as required by the terms of the deed. Thereafter the successor trustee filed its bill by way of counter-claim to foreclose.

May 19, 1936, the court appointed a receiver for the property and on and prior to that date the petitions for attorneys' fees, on which the orders of June 23, 1936, and August 1, 1936, were entered, were filed. The record shows that there are 158 persons who hold bonds in the issue involved in this proceeding, and that several of them are non-residents of this State. Persons holding about 85% of these bonds filed the same with the protective committee, and

with the exception of Tina Ortgiesen and Lena Sachs none of them joined in these proceedings.

Disregarding contentions made by the appellants which are purely technical, the controlling question in the case is whether the services rendered by petitioners to the trust estate were of a kind and character such as to justify these respective orders. The bill filed by the plaintiffs was representative in form and character. Plaintiffs asked and obtained a list of names and addresses of bondholders, which were found to be 152 in number. However, only Tina Ortgeisen and Lena Sachs joined in the litigation and became actual parties to the suit. The fair inference is that the greater number of bondholders did not approve of the bill filed by plaintiffs as being in their interest. Indeed, the bill itself alleged that through depositing their bonds and acting in conformity with the plans of the protective committee, the depositing bondholders had subordinated the lien of their bonds to that of the plaintiffs. The averments of the bill in that regard and prayer for relief of that kind was inconsistent with and against the interest of other bondholders. The net result obtained by the filing of plaintiffs' bill was a decree directing the foreclosure of the trust deed and later the appointment of a receiver for the premises. In resisting the petition for foreclosure, the trustee relied on a provision of the trust deed to the effect that the trustee should not be required to take any action to foreclose unless requested to do so by the holders of 25% in amount of the bonds then outstanding. The trial court apparently held this provision unavailable under the circumstances, but there is nothing to indicate that the trustee failed to act in good faith. The trustee could have reasonably relied on decisions of the courts holding such a provision valid. Pearlman v. Lincoln-Belmont Building Corp., 251

Ill. App. 135; Cohen v. Central Republic Tr. Co., 280 Ill. App. 569; Chicago Title & Trust Co. v. Robin, 361 Ill. 261. The absence of findings in the decree of May 5, 1936, which directed the foreclosure is significant. It does not find that the trustee was derelict in its duties. It contains no finding that rents, issues and profits had been improperly used by the bondholders protective committee, or that the committee should account for any sum of money whatever, or that it was failing to protect the interests of all the bondholders, depositing and non-depositing, or that defendants had taken any action against the best interests of all the bondholders. There is no finding that petitioners through the proceeding carried on by them have preserved the trust estate, restored the trust estate to trust uses, or created any fund which will result in a common benefit to the parties whose profit has been ordered taken for the payment of these services. The most that can be said upon this record is that possibly the future may disclose that these services of petitioners have been of some value to the bondholders.

The allowance of compensation for attorney's services in this class of cases is unusual. Under circumstances far more compelling than any which here appear, such allowance was approved by this court in First National Bank of Chicago v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 188. One of the Justices practically dissented, placing his formal concurrence upon the express ground that no objection was raised in the trial court to the allowances made. After a discussion of authorities in this and other jurisdictions, we there stated the rule to be as follows:

"We think the rule is firmly established that a court of equity or a court in the exercise of equitable jurisdiction will, in its discretion, order an allowance of solicitor's fees to a party who, at his own expense, has maintained a successful suit for the preservation, protection or increase of the common fund or

of common property, or who has created at his own expense or brought into court, a fund which others may share with him. Trustees of Internal Improvement Fund v. Greenough, 105 U. S. 527; Central [illegible] & Banking Co. of Georgia v. Pettus, 113 U. S. 116; Hobbs v. McLean, 117 U. S. 567; Harrison v. Perea, [illegible] 311; Madison v. Chicago Co-operative Brewing Ass'n, [illegible] Ill. App. 411; Stand v. Stand, 166 Ill. App. 536; Ahrend v. [illegible] Fund Commission, 171 Ill. 96; Hepstead v. Deaville Theological School, 286 Pa., 493 (49 A.L.R. 1145.)"

In the Wacker case no party questioned or could question the value and utility of the services which had been rendered in behalf of all the beneficiaries. Here the utility and value of the services is denied by the successor trustee and representatives of a large majority of the beneficiaries. It is impossible to say whether the services of the petitioners will ultimately be a benefit or a detriment to the estate. We know of no case where under such circumstances such allowances have been permitted to stand. The objections of the successor trustee and of the bondholders must therefore be sustained.

Upon what theory the second order, making the allowance of fees a first lien against the receivership estate, was entered we do not see. As the owner of the equity points out, income from real estate in the possession of a receiver pending the prosecution of a proceeding to foreclose a trust deed may be applied only to the payment of the necessary and proper expenses incurred in the administration of the receivership estate; and it is the duty of the receiver to collect and hold the income until the foreclosure sale, when, in the event of a bid insufficient to satisfy the mortgage indebtedness, the rents may be applied on the deficiency. If the mortgaged property is bid off at the foreclosure sale for the full amount of the decree, interest and costs, the owner of the equity of redemption is entitled to all the income from the premises and the possession thereof until the period of redemption expires. Davis v. Dale, 15[illegible] Ill. 2[illegible]9; Liberty v. Loren, [illegible] Ill. App. 3[illegible]2;

Hindman v. Off, 246 Ill. App. 528; Corcoran v. Fitz, 252 Ill. App. 473; Shinnick v. Mincer, 259 Ill. App. 107.

On no theory of which we can conceive may it be held that the services of petitioners were in the interest of or for the benefit of the owners of the equity of redemption. We hold that both orders were erroneous and improvidently entered, and for that reason both will be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

[illegible]

ALBERT KLOMAN, HAROLD SCHAGMAN and [illegible] E. [illegible],
Appellees,

vs.

JOHN A. MCLAIRD, JEROME P. BOMES and VINCENT [illegible],
Appellants.

HORATIO B. HACKETT, JOHN [illegible] GOOT, JOHN C. [illegible], JOHN [illegible] HAWIN, RALPH A. DAVID & COMPANY, an Illinois corporation, and [illegible] B. FRANKENSTEIN,
Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

289 I.A. 611

MR. PRESIDING JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs are the owners of certain bonds in the aggregate principal amount of $4000, being a part of an issue by the Michigan Chestnut Building Corporation on November 27, 1927, for the aggregate principal amount of $575,000. The bonds are by their terms payable to bearer, draw interest at the rate of 6-1/4% per annum payable semi-annually, with interest at 7% per annum after maturity. November 15, 1927, this issue of bonds with coupons representing the interest which would accrue thereon were delivered to Greenebaum Sons Investment Company in recognition of the indebtedness of the building corporation to the investment company. On the same date the building corporation executed and delivered to the Bank of America, as trustee, a trust deed conveying to said bank a leasehold estate made by one Sawyer, as lessor, to the Michigan Chestnut Building Corporation, as lessee. As a part of this transaction in which these bonds and trust deed were delivered, and for a valuable consideration, the defendants under their hands and seals executed and delivered an instrument in writing, in and by which they guaranteed the payment of these bonds and coupons to each and every holder of the bonds and coupons, and to the heirs, legal representatives, successors and

assigns of each and all of them.

This suit at law is against these guarantors upon this guaranty. The complaint expressly declares on the guaranty and a copy of the writing by which defendants guaranteed payment is attached to the complaint and made a part of it. It is alleged and admitted that the Building corporation failed to pay the interest that became due and payable on the bonds November 15, 1932, May and November 15, 1933, and May and November 15, 1934. Because of these defaults the successor trustee declared all the indebtedness that had not matured to be due and payable, as it was by the trust deed authorized to do.

March 31, 1934, the Central Republic Trust Company, successor trustee, filed in the Circuit court of Cook county its bill to foreclose the trust deed, the case being No. 34-C-4253 in that court. This suit at law by these plaintiffs upon the written guarantee was filed in the same court on December 24, 1934. The complaint was duly verified, setting forth the above facts as already stated, with a verbatim copy of the guaranty attached to the complaint and made a part of it. By paragraph 18 of the answer as amended, defendant interposed the defense of another action pending. This amended paragraph was on motion of plaintiffs stricken. It will be unnecessary to describe other pleadings further than to say that if true the answer set up a substantial defense in that, under the facts averred, if true, the written guaranty had by its own terms terminated. Affidavits and evidence were submitted on this issue upon a motion made by plaintiffs for summary judgment. July 17, 1936, the death of plaintiff Goldman was suggested, and the administratrix substituted. The motion for summary judgment, in conformity with section 57 of the Practice act and Rule 15 of the Supreme court, was heard. The motion was allowed and judgment was entered in favor of the Goldman estate for $1545.24; in favor

of plaintiff, Rebecca Cobacker for $3493.08; and in favor of plaintiff, Miller, for $1345.54. Defendants Holmbird, Bowes and Bendix prosecute this appeal.

Defendants say there are three separate questions presented in this record for the determination of the court. Whether plaintiffs are entitled to maintain their action in view of the action pending in their behalf by the Central Republic Trust Company, as successor trustee, against defendants upon this same written guaranty; whether or not the affidavits and deposition filed in support of plaintiffs' motion for summary judgment are sufficient, and third, as to whether the affidavits filed by defendants in opposition to plaintiffs' motion present a defense sufficient to entitle them to defend upon the merits.

As a matter of fact, we think the controlling questions arising on the record may be reduced to two. First, whether the court erred in striking on motion of plaintiffs paragraph 18 of defendants' answer as amended, and second, whether the affidavits submitted by defendants disclose facts from which an issue on the merits arose as to whether the guaranty was in fact terminated. Irrespective of these two issues, the questions arising on the record are not unlike those considered in Chicago Title and Trust Co. v. Cohen, 284 Ill. App. 181, which, contrary to the contention of defendants, was a proceeding in conformity with section 37 of the Practice act and Rule 15 of the Supreme Court.

As the first point is controlling, we shall give it consideration. The amended paragraph was filed May 13, 1935. The paragraph was stricken by order entered May 3, 1938. The paragraph is as follows:

'That this suit cannot be maintained because there is another and prior action pending between the same parties for the same cause in that on or about March 31, 1934, Central Republic

Trust Company as successor trustee under the trust deed securing said bonds alleged to be owned and held by the plaintiffs herein, by virtue of the powers granted to it by the said trust deed and the guarantee herein sued upon, brought an action in the Circuit Court of Cook County, being Case No. 34-C-1383 of said court, and caused to be issued out of that court on or about said March 31, 1934, a summons requiring each of the defendants herein named as defendants to appear and defend against the complaint filed by the said Central Republic Trust Company as successor trustee, which said complaint sought to enforce on behalf of all the bondholders, including the plaintiffs herein, the guarantee herein sued upon, as will more fully appear from an examination of the records and proceedings on file in said cause in this court; that by virtue of the provisions of the said trust deed and the guarantee herein sued upon the said Central Republic Trust Company, successor trustee, in said suit, is acting on behalf of the plaintiffs herein, among others; that service of summons was had in said joint action upon the defendant Jerome F. Bowes, on the 14th day of April, A. D. 1934; that said suit is still pending and undisposed of, and these defendants therefore jointly and severally pray that this cause of action be dismissed or abated as to them."

In favor of the motion to strike, it is urged that the plea of another action pending is a dilatory plea and therefore not amendable. Bacon v. Schepelin, 185 Ill. 132, and Spencer v. Aetna Indemnity Co., 331 Ill. 82, are cited. These cases hold that at common law a plea in abatement which is dilatory in its character might not be amended, but the plea of another action pending was not then and is not now one to which the rule is applicable, for the reason that it was and is regarded as a meritorious plea. Buckley v. Harlan, 54 Ill. 361. Section 48 of the Civil Practice act specifically provides that the defense of another action pending may be set up either by motion to dismiss or by answer. We hold that the plea was amendable at the discretion of the court.

It is contended in the next place that the averments of this paragraph of the answer are insufficient for the reason that the pleadings of the alleged former suit are not sufficiently set forth to enable the court to determine that the same issues are in fact involved in this as in the former suit. Defendants cite Torma v. Letts, 177 Ill. App. 388. The opinion in that case states:

"While the plea formally states that the bill in the cause dependent was for the same subject-matter and sought the same relief, nevertheless it fails to set forth with any degree of certainty what was absolutely essential - its nature, character and objects,

and the precise relief prayed therein (Story, Equity Pl., 23th ed, sec. 737), or that the proceedings in the former suit were taken for the same purpose (Id. sec. 737; Johnson v. Harrison, 3 Ch. & Cr. 500), or even that any process was issued requiring Pretzsch's appearance."

The statement does not sustain plaintiffs' contention, nor is it sustained by any provision of the Civil Practice act called to our attention.

Neither the forms given in Illinois Civil Practice Act Ann. by McCaskill (see Appendix I, form 48, p. 38) nor in Edmunds Illinois Practice Forms (see Nos. 1147, 1148 and 1583) indicate that it is necessary to set up the pleadings of the former suit. It will, however, be noted that the pleadings in the former suit here are alleged by paragraph 18 to be on file in the court in which the instant action is pending and, of course, are subject to inspection.

It is next contended that the paragraph should have been stricken because plaintiffs have the right to pursue concurrently three remedies on account of a mortgage indebtedness. That is, the plaintiff may sue at law for the debt, may foreclose in equity or bring ejectment for possession. So it is said a suit by the trustee to foreclose the mortgage could not bar a suit by a bondholder upon a guaranty of payment of the bonds. Kolkenstein v. Slemin, 386 Ill. 308; Lavelle v. Steiner, 270 Ill. App. 181; Hibbard v. Prudence Co., Inc., 372 N. Y. Supp. 808, are cited. This proposition is well established and unquestioned, but that is not the question raised by this paragraph of the answer. These cases do not hold that a plaintiff may bring two suits at law at the same time in the same jurisdiction on the same cause of action, or that he may bring two suits in ejectment for possession under the same circumstances, or two foreclosures on the same mortgage.

It is next argued that the allegations of this paragraph of the answer that the trustee brought the action by virtue of the powers granted to it by the trust deed and the guaranty is a pure conclusion of law as is the allegation that the trustee is acting on behalf of the plaintiff by virtue of the guaranty. It is again said that the trust deed nowhere appears in the plea, and the pleadings in the foreclosure action are nowhere set up. The plaintiffs say that the defendants ask the court to accept defendants' own legal conclusions as to the legal effect of the guaranty and of the trust deed. To this point plaintiffs cite Cole v. Greer & Sons Co., 296 Ill. App. 572, and Chicago Title and Trust Co. v. Ophen, 284 Ill. App. 131, 137, with many other cases. They urge that a suit in assumpsit for the debt and a suit to foreclose the trust deed against the property may be brought concurrently, and that any provision of the trust deed purporting to give the exclusive right of action to the trustee would be held to apply only to the foreclosure proceedings. Gauge v. Simon, 288 Ill. App. 186, is cited. They say the holder of the bond can discard the mortgage entirely and sue on the bond. Sturgis Nat. Bank v. Harris Trust & Savings Bank, 351 Ill. 485. Even language in a trust deed purporting to bar a suit at law is held applicable only to proceedings involving the mortgaged property. Gaviness v. Kessler & Mandell, Inc., 359 Ill. 303; and defendants say that examination of paragraph 18 in the light of these authorities shows that the only allegation here is that the trustee brought a foreclosure action in which it sued in behalf of all the bondholders to recover on the guaranty.

Defendants also argue that even assuming that the paragraph shows authority in the trustee to bring an action at law upon the guaranty, this would not authorize bringing such an action with a foreclosure proceeding, and they cite Meany v. Hahn,

174 Ill. App. 155. Only, it is again said, that by making the pleadings of the former action a part of the plea could the court be shown what the nature of the proceedings really was, and plaintiffs cite other cases where motions to abate a suit at law because equitable proceedings were pending were disallowed for the reason that the remedies were concurrent. The cases cited are Erikson v. Hart, 266 Ill. 213, where a suit to enforce a mechanic's lien was involved. Sweeney Mfg. Co. v. Goldberg, 88 Ill. App. 556, where a subsequent creditor's bill by another debtor was permitted although a prior proceeding of the same kind was pending. Irish v. Simpson, 229 Ill. 58, where a petitioner, praying that a will in the Probate court might be set aside, was held not to be precluded by the fact that petitioners prior thereto had filed a suit in chancery to set aside the probate of the same will.

The Sweeney case is, we think, inconsistent with the case of Leonard v. Rye, 361 Ill. 185, which is of course controlling. The other cases are not applicable or controlling here, although the principles announced therein are not at all questioned. Plaintiffs lose sight of the real issue. It is not a question of what the rights of a bondholder to maintain a suit on the guaranty are. That right is admitted. The real question is, Does a bondholder have a right to maintain two suits at law against the guarantor, one in which he personally prosecutes the suit at law, and the other in which he prosecutes by his trustee to the same end and in the same court and against the same defendant? The plaintiffs have entirely overlooked section 44 of the Civil Practice act, which permits the joinder of legal and equitable actions. Under that section it is permissible to join an action to foreclose in equity with a suit at law on the guaranty. Under that section the law as stated in Walsh v. Van Horn, 33 Ill. App. 170, on which plaintiffs rely, is no longer applicable. Plaintiffs are mistaken

when they say that the guaranty agreement was not before the court. A verbatim copy of it is attached to the complaint. It appears on pages 5 to 14 of the abstract. The guaranty expressly provides:

"For said considerations said parties of the first part further jointly and severally agree that they or either of them may be joined in any action against said Michigan-Chestnut Building Corporation and that recovery may be had against them or either of them either in such action or in any independent action without expending any remedy or claim against the said Michigan-Chestnut Building Corporation.

In the event of the foreclosure of the deed of trust hereinabove referred to and of a deficiency, said parties of the first part hereby jointly and severally guarantee, promise and agree to forthwith pay the amount of such deficiency, but this covenant shall not limit or qualify the other remedies which may be pursued under this guaranty."

Paragraph 2 of Section 42 of the Civil Practice Act provides:

"No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

We think that provision of the Civil Practice act is applicable to this plea of another action pending. The other suit pending was identified by number as well as by parties. It was pending in the same court in which plaintiffs sued and inspection of the pleadings was tendered by the plea and the pleadings were easily available for that purpose. Neither in Schneider v. Smith, 271 Ill. App. 414, nor in Leonard v. Bye, 361 Ill. 185, did defendant incorporate the pleadings of the former suit in his plea, yet in both cases the pleas were held sufficient. In Leonard v. Bye, the plaintiff was held precluded on facts which while distinguishable are much like those which here appear.

The purpose of the rule which prevents the maintenance of two suits upon the same cause of action is that a defendant may not be vexed by many actions. That reason is certainly present in this case. There is also the additional reason that equality may prevail as between the many holders of these bonds whose rights under the terms of the guaranty are equal. From the equitable standpoint there seems to be many reasons why the successor trustee

by a suit at law in behalf of all these bondholders may protect and provide for the rights of all the parties with a great degree of certainty and expedition and also fairness and justice to all concerned. These reasons were held to be controlling in Jennings v. Ryg. The plaintiffs assert that the parties are not the same because only one of the defendants has been served with process in the suit by the successor trustee. Before the adoption of the Civil Practice act a suit was pending for the purpose of a plea of a prior suit pending when the summons was issued and placed in the hands of the sheriff. Pollack v. Kinsey, 176 Ill. App. [illegible]. By the terms of the Civil Practice act, sec. 5, a civil action is begun when summons is issued. In the successor trustee's suit the summons was duly issued and delivered to the sheriff for service and one of the defendants was actually served. Service of summons was not, however, essential to the validity of the plea. Taylor v. Southern Ry. Co. 6 F. Supp. 259.

We hold that the court erred in striking the 18th paragraph of the answer, and for that reason these judgments will be reversed and the cause remanded with directions to set aside the order striking that paragraph.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

39204

15

TINA ORTGIESEN,
Plaintiff,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al.,
Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Gen. No. 39193.

On Appeal of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, E. G. SWANSON, R. J. PFORDRESHER and E. MERTENS, not individually but as a bondholders' protective Committee, WILLIAM A. LOMAX, not individually but as trustee under trust No. 396, RAYMOND J. DOWNEY, as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILLICI and JOHN REZZONICO,
Appellants.

289 I.A. 611

TINA ORTGIESEN,
Plaintiff,

vs.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al.,
Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Gen. No. 39204.

On separate appeals of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, and RAYMOND J. DOWNEY, as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILLICI and JOHN REZZONICO,
Appellants.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal, like No. 39193 with which it was consolidated for hearing in this court, is from an order allowing two petitioners, Francis E. Cash and Morris Blank, solicitors' fees to be taxed against the trust estate. The facts concerning both orders are fully set forth in the opinion this day filed in No. 39193. For the reasons stated in that opinion this order of August 1, 1936, like that of June 23, 1936, will be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

39287

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

245 EAST GRAND AVENUE SEARCH WARRANT.

OUTDOOR PUBLISHING CO., a Corporation,
Intervening Petitioner,
Appellant.

/6

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 612

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

May 27, 1936, James P. Hackett, by leave of court, filed a complaint against John Doe asking for a search warrant of the premises above described, 245 East Grand Avenue. The information was brought under paragraph 463 of chapter 38 of the Criminal Code. Smith-Hurd Illinois Revised Statutes 1935. Illinois State Bar Stats. 1935, page 1216 and paragraphs 715-721. The warrant was issued on the same day the premises were searched, and certain magazines were seized and brought into court. The matter was continued from time to time until August 4th, when there was a finding for the People and an order for the condemnation and destruction of the literature. Motions for a new trial and in arrest were overruled, and afterward an order entered staying the destruction of the property. The appellant, the Outdoor Publishing Company, appeared and moved to vacate the order, claimed the property and prayed that it might be delivered to it. The motion was denied, and the publishing company appeals.

We do not care to place our judgment in this case on any merely technical ground. A copy of the publication seized is attached to the record. It is a magazine which purports to be devoted to extolling the artistic beauty of the undressed human body of both sexes, apparently photographed in the presence of each other. This is the theme of the brief of the intervening

petitioner, who cites City of Chicago v. Jackson, 187 Ill. App. 243, where this court affirmed a judgment of not guilty under a municipal ordinance which forbade the exhibition of "indecent or lewd" pictures. We there said of that picture: "It is not indecent, although this may not be said of much of the exploiting of it."

In that case there was an inspection of the picture by the court. We have inspected this publication. We find it is not artistic but ugly, not decent but lewd and indecent. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39322

17

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY C. SHAVER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

289 I.A. 612

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendant, Shaver, having waived a jury was tried by the court upon an information filed March 17, 1935, which in three counts charged violation of Chapter 91, Section 24 of the Act concerning Medicine and Surgery. (Ill. State Bar Stats., 1935, p. 2055.) The information in substance charged that on March 17, 1935, the defendant, not possessing a license from the State to practice the treatment of human ailments in any manner, on the 17th of March, 1935, unlawfully diagnosticated or attempted to diagnosticate, operate upon, profess to heal, prescribe for, or otherwise treat an ailment or supposed ailment of another, in that he then and there prescribed the taking of certain tablets internally, one after each meal, for an ailment or condition in conjunction with the pregnancy of Mary Bosch; that under like circumstances, at the same time, he unlawfully suggested, recommended, operated upon, professed to heal, or otherwise treat an ailment or supposed ailment of another, with the intention of receiving therefor, either directly or indirectly, a fee, in that he unlawfully prescribed for alleged pregnant condition of Mary Bosch the taking internally of certain tablets of unknown composition by her with the intention of receiving a fee therefor, a portion of the sum, $15, being paid in cash on May 16th; that under like circumstances, on the same date, he unlawfully attached the titles "Dr.", "Physician", "Surgeon", "M.D." or other words or abbreviations to his name, indicating that he was engaged in the treatment of human ailments as a business, by un-

lawfully signing his name as "Shaver, M. D." thereby attaching to his name the title of "M. D.", indicative that he was engaged in the treatment of human ailments as a business, all in violation of the provisions of section 24.

There was a trial by the court, the jury having been waived, a finding of guilty, and judgment sentencing the defendant to the Cook county jail for a period of one year and to pay a fine of $500 and costs; that in default of payment after the expiration of his term of imprisonment he shall stand committed to the county jail until the fine and costs are paid or he should be discharged according to law.

The defendant sued out a writ of error in the Supreme court. That court, for the reason as stated in its opinion that no question was presented giving it jurisdiction, transferred the cause to this court. People v. Shaver, 364 Ill. 326.

It is contended in the first place that the court erred in denying leave to defendant to file a motion to quash the information. The information was filed February 3, 1936, charging the commission of the offense on March 17, 1935. On February 11, 1936, defendant appeared in court with his attorney, was arraigned and entered a plea of not guilty, and the cause was continued until March 3, 1936. On March 3rd defendant appeared with his attorney and the cause was set for hearing on March 10th, upon the promise of defendant's attorney that he would be ready for trial upon that date. On March 10th the defendant appeared with another attorney who filed a motion to withdraw the plea of not guilty, without, however, making any showing in support of the motion. The motion was denied by the court and the ruling is now argued as error. Under the circumstances, we hold the ruling was within the discretion of the court. People v. Brickey, 346 Ill. 274.

It is next urged that the information does not state an

offense, first because it does not negative by proper averments that the treatment given the patient by defendant was administered in emergency, and second because the information failed to aver that a fee was paid to the defendant, and also because the information is insufficient to inform the defendant of the nature and cause of the accusation against him. People v. Brown, 336 Ill. 257, is relied upon. In that case an information filed charging a violation of section 2 of this statute (Ill. State Bar. Stats. 1935, chap. 91, p. 2050) in the language of the statute was held insufficient and violative of the constitutional rights of the defendant. The information in that case was not at all like the one which we are required to consider here. We think we are precluded from sustaining this contention by the transfer of the cause to this court by the Supreme court. Technical questions as to the sufficiency of the information are not preserved by the motion in arrest. People v. Pampilio, 359 Ill. 609. Section 24, under which this information was filed, does not by proviso except emergency cases therefrom. That provision is contained in section 37 of the Act (Ill. State Bar Stats., chap. 91, p. 2056), which provides that the act shall not apply to dentists, pharmacists, optometrists or other persons lawfully carrying on their particular profession or business under any valid existing act of the State regulatory thereof, nor to persons rendering gratuitous services in cases of emergency, nor to persons treating human ailments by prayer or spiritual means as an exercise or enjoyment of religious freedom. We hold that all these exceptions were matters to be set up by way of defense, and that it was unnecessary to negative the same in the information. People v. Prystalski, 356 Ill. 190; People v. Allen, 360 Ill. 36. The evidence taken upon the trial discloses the guilt of the defendant beyond all reasonable doubt, and without any mitigating circumstances. The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39133

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Successor Trustee,
Plaintiff,

vs.

EGIDIO MAZZARESE et al.,
Defendants.

HARRY FRIEDMAN,
Appellant,

vs.

E. G. SWANSON et al.,
Appellees.

18

289 I.A. 612

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order approving the master's report of sale in a foreclosure proceeding; the report of sale stated that the property was purchased pursuant to a plan of reorganization, and a copy of this plan is attached to the report, and the order also approves the plan of reorganization.

Defendant's main point is that the court was without juriddiction, in a foreclosure proceeding, to approve a sale and a plan of reorganization. The jurisdiction of a court of equity in foreclosure proceedings to supervise a plan of reorganization has been a subject of much controversy in the courts. However, our Supreme court in an opinion filed February 12, 1937, in First National Bank of Chicago, etc. v. Bryn Mawr Beach Bldg. Corp. et al., discusses this controverted question at length and holds that a court of equity has jurisdiction to supervise a reorganization plan. This disposes of the major portion of the defendant's controversy in the instant case.

It should be noted that the master, in making the sale, followed the directions of the previous decree, from which no appeal was taken.

[illegible]

[illegible]

[illegible]

Defendant questions the sale in that the master accepted a bid partly in bonds and partly in cash. The trust deed provided that the bonds might be used and applied toward payment of the bid, and the decree was to the same effect. Even in the absence of such provision in the trust deed a decree in foreclosure properly permits a creditor to bid and to credit on his bid the amount found due him by the decree. Koerner v. Gauss, 67 Ill. App. 668, and Chillicothe Paper Co. v. Wheeler, 63 Ill. App. 343, 348.

Some suggestion is made that the amount bid was inadequate and that this plus the sale to a socalled "dummy purchaser" requires the disapproval of the sale. The principal amount of the outstanding bonds was $122,000 and the sale price was $32,[illegible]. It was not claimed in the objections filed by the defendant to the master's report that this sale price was inadequate; the buyer was a representative buyer pursuant to the plan of reorganization.

In Chicago Title and Trust Co. v. Robin, 361 Ill. 261, 273, the court said that judicial sales "should not be disturbed unless there has been some fraud, mistake or violation of duty by the officer making the sale or by the purchaser," none of which is shown here.

The reorganization plan is attacked with earnest language, without giving any clear statement as to what the plan is or any basis for the criticisms directed against it. It is said that the bondholders were coerced to accept the terms offered by the bondholders' committee or be frozen out. The bondholders' committee was organized solely for the protection of the holders of bonds secured by the trust deed, and a total of $110,400 was deposited out of $122,000 outstanding. The non-depositing bondholders were notified of every step in the foreclosure proceeding and had the option to elect to receive in cash their share of the bid price or to participate with the other bondholders as a stockholder. This

condition obtains generally in all similar reorganization plans and has been approved in the supreme court opinion in the First National Bank case.

The instant plan provided that 20% of the stock should go to the owner of the equity, and this feature is criticized. But the plan also provides that the stock certificates issued to the owner shall be indorsed in blank by him and deposited with the escrow agent under an escrow agreement providing that in the event the owner fails to exercise an option to purchase the property within three years the stock certificates shall be delivered to the corporation and canceled and the owner shall have no further rights as a stockholder. This 20% stock had no practical value to the owner except to give him a minority voice in the management of the corporation, and if he did not exercise the option to purchase all his rights as a stockholder ceased.

Some suggestion is made that the fees are excessive. Most of these were awarded in the original foreclosure decree, which was not questioned, and we find nothing to support the claim of excessive fees.

No facts are presented which would justify this courtin reversing the order approving the master's report of sale and the plan of reorganization. The decree is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39178

19

KELLAM FOSTER,
Appellant,

vs.

JOHN H. POWRIE, doing business under the trade name of WARNER RESEARCH LABORATORY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 613

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered by the court, without a jury, in an action to recover $1000, claiming the rescission of a contract alleged to have been breached by defendant.

Defendant, Powrie, was the owner of a process of color photography invented by him and Florence Warner, who was deceased at the time of the contract with plaintiff; certain patents has been issued and applications for other patents were pending.

November 15, 1926, defendant made an agreement with plaintiff which recited that plaintiff had paid defendant $1000 "for purpose of assisting * * in developing, demonstrating and marketing said process and inventions"; defendant conveyed to plaintiff "a 1/10th of 1% interest or share in any and all income, moneys or other things of value that may be derived from the sale, or license, or use of said Warner-Powrie Process"; that the defendant "will proceed with due diligence to prosecute his efforts to dispose of said inventions and processes to the best advantage to interested parties by preparing plates and films for color photography, and demonstrating their use therefor."

April 26, 1932, defendant entered into a voluntary assignment of his assets for the benefit of his creditors under the laws of the State of New York, and plaintiff says this was an anticipatory breach of the contract.

September 22, 1933, plaintiff filed his statement of claim alleging his purchase of an interest in the income from the process, and that defendant, in violation of his agreement to proceed with due diligence to dispose of the process to the best advantage, made a voluntary assignment of his assets in which he conveyed to assignees all patents, inventions and applications covering the process, and all machinery and equipment for developing it, and that defendant by his own acts prevented himself from performing the agreement, to the damage of the plaintiff.

November 24, 1933, plaintiff filed an amended statement of claim setting out at some length and in detail the substance of the original statement of claim and also the requisites of a voluntary assignment under the laws of New York, and that by virtue of such assignment all title and interest to the patents and laboratory and equipment became vested in the assignees; that they were later ordered to be sold at public auction and were afterward transferred by the assignees and defendant to one Caddy of New York as trustee under a composition agreement whereby Caddy took title to all the patents and equipment, for the benefit of creditors, and upon failure of defendant to pay certain notes at maturity the trustee was empowered to sell all assets and divide the proceeds among the creditors in proportion to the amounts due them; that defendant has not paid the notes and the trustee is authorized to sell the assets; that by reason of the assignment and composition agreement plaintiff is deprived of any possibility of receiving any income from the sale, license or use of the process; that the laboratory has been closed by defendant or his assignees and the machinery and equipment placed in storage; that the assignment and composition agreement were executed by defendant to defraud the plaintiff; that in defendant's list of creditors in the assignment proceeding were listed certain false and fictitious claims; that plaintiff's

suit was upon the contract.

Defendant's amended affidavit of merits admits plaintiff's interest as stated and avers that continuously he is prosecuting his best efforts to dispose of the inventions to interested parties; admits the general assignment made by him but asserts that it was not in violation of their agreement, and denies that the assets and patents were ever offered for sale by the assignees; alleges that the transfer to Caddy was ineffective and the composition never became operative; denies in general the allegations of plaintiff that defendant has disabled himself from performing his agreement with plaintiff or that the assignment or composition agreement were executed for the purpose of defrauding plaintiff. An amendment was later filed in which defendant asserted that he had sold to various investors, including plaintiff, an aggregate of 65% interest in his patents; alleged that the composition was null and void because of the failure to comply with various requirements of the New York law which are set forth in detail; that a petition has been filed in the assignment proceedings demanding that the composition agreement and transfer to Caddy be adjudged null and void, and that if this is granted arrangements have been made with defendant's creditors authorizing the assignees to reassign to defendant the process and inventions.

February 5, 1935, plaintiff filed an amendment to his statement in which he alleged that he had elected to rescind the written agreement and to recover back the $1000 paid.

Defendant answered, claiming that plaintiff had not rescinded and alleging that he still held a valuable equitable interest in all patents which were held by defendant as trustee for plaintiff and other investors.

The contract between the parties contains no express or implied warranty of success nor any guarantee of returns by Powrie.

The process was still in an experimental stage. Defendant needed money to proceed with his work; to raise funds for this purpose he assigned to various persons interests in the expected profits; defendant promised only to use diligence in efforts to dispose of the process to interested parties. We do not find any claim by plaintiff that defendant has failed in this respect, or that the funds supplied by investors were wrongfully used. The record shows that defendant attempted to interest various parties, giving demonstrations in Chicago and in Hastings, N. Y., also taking up the process with the Eastman Kodak Co. and the Duponts.

Plaintiff argues earnestly, however, that the voluntary assignment and the composition agreement with the creditors amounted to an anticipatory breach, citing cases like Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 52, and Central Trust Co. v. Chicago Auditorium Ass'n., 240 U. S. 581. These cases involve contracts not like that in the instant case. This contract was in the nature of a conveyance of a speculative interest; the process was not perfected; further patents were necessary; plaintiff made an investment which from the very nature of the case might not result in profits; he took a chance of losing if circumstances prevented gain.

Moreover, the record shows defendant was compelled by circumstances to make a voluntary assignment for the benefit of creditors and that the proceedings were for the purpose of protecting the interests of the defendant and the investors in the process. There was a claim against the defendant of $11,000 for unpaid rent on the quarters occupied by him as a laboratory in New York; the landlord was threatening judgment and execution; defendant had no funds to meet these claims and in good faith sought the advice of an attorney, and the assignment proceedings and composition were carried out under this advice.

Plaintiff's counsel seeks to make much of the alleged false or fictitious debts or claims scheduled by defendant. Defendant had been associated with Florence Warner as co-inventor of the process; certain persons had advanced funds to be used in furthering the photographic inventions; under the advice of his attorney defendant listed these claims as being possible claims against the patents and equipment; it was only out of abundance of caution that they were listed in the schedule of creditors of the defendant. Defendant denied that he personally owed these persons listed as creditors. We are of the opinion that there was no anticipatory breach of the contract.

The trial court held that plaintiff by his acts had affirmed the contract and was not entitled to recover upon his statement of claim alleging a rescission. The record shows that plaintiff filed his original action as a suit for damages on the contract. There is no evidence that plaintiff ever offered to release his interest in any income to be derived from the process. It is well established that one seeking to rescind a contract must offer to put the other party in status quo. Rusted v. Berry, 321 Ill. 354, 359. And in an action at law plaintiff must place defendant in status quo before instituting suit. Florsheim v. Batzert Co., 278 Ill. App. 54, 59. Rescission of a contract requires affirmative action immediately on the discovery of any fraud. Richardson v. Lowe, 149 Fed. 625, 630. In Anderson v. Chicago Trust and Savings Bank, 195 Ill. 341, 347, a purchaser of stock first filed a bill for an accounting and an injunction to restrain the defendant from disposing of his stock; two years thereafter plaintiff sought to amend his bill by claiming a rescission of the contract of purchase; it was held plaintiff could not rescind after having previously filed his bill for an accounting; that his first step constituted

an election, after a full knowledge of the alleged fraud, to affirm the contract of sale.

The record shows that in April, 1932, plaintiff acted as chairman of a committee of Chicago investors in the process, calling meetings of the committee; he also received letters and notices advising him of the situation in New York and of the assignment and composition agreements. He also signed a document addressed to the bidders and purchasers at the proposed sale of assets of the defendant in New York, reciting the interests of the various investors and that such interests were not subject to the debts of the defendant. Plaintiff during this time was active in attempting to protect his interests as an investor. Plaintiff's original statement of September, 1933, and his amended statement of November, 1933, both sounding in damages on the contract, and his actions, evidenced an election to stand upon the contract, and this bars any right to rescind as claimed in his statement of February, 1935.

Apparently no sale of defendant's assets has been held, and if the composition and assignment to Caddy has not been set aside, we see no reason why plaintiff might not assert his rights, if any, against Caddy.

We find no error with reference to the admission of evidence. Counsel for plaintiff argues that the court improperly refused to make certain findings of fact requested by plaintiff, but under section 64 of the Civil Practice act of 1933 (Ill. State Bar Stats.) the trial court was not obliged to make findings of fact.

Counsel for plaintiff has cited a large number of cases, which do not touch the essence of the instant case. Most of them are concerned with promises of one of the contracting parties to pay money for certain undertakings of the other. Here there is no

[illegible]

such promise. Plaintiff with others staked the defendant in perfecting the photographic process and took a hazard of gain or loss. Having elected in the first instance to stand upon his contract plaintiff cannot, over a year thereafter, elect to rescind.

The judgment of the trial court is right and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

38967

30

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	
vs.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
WILLIAM JACOBSON, Plaintiff in Error,	)	

289 I.A. 813 2

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Jacobson, seeks to reverse a judgment of the Municipal court of Chicago by which he was found guilty of obtaining money by means of false pretenses and with intent to cheat and defraud. He was sentenced to be confined in the House of Correction for one year and fined $2000. The information charged that "Mr. W. M. Jacobson" did unlawfully and fraudulently with intent to cheat and defraud by means of false pretenses, represent to Bertha Merritt that he would then and there deliver to her a certain quantity of furniture which she was willing to purchase, and that he induced her to then and there deliver to him $140 and that he delivered to her other furniture. Defendant pleaded not guilty, a jury was waived, the court heard the evidence, found the defendant guilty and sentenced him as above stated.

Defendant contends, as stated by his counsel, that "The information was insufficient and void. It charges the defendant with no crime or offense. * * * Where an information charges no crime, the proceedings thereon are null and void"; and that the question of the sufficiency of the information is saved by defendant's motion in arrest of judgment. A further point is made that the information charged "Mr. W. M. Jacobson" with the offense, while the court found "William Jacobson" guilty and imposed the sentence.

A number of authorities are cited in support of the contentions made. We will not stop to discuss the authorities cited

because substantially all of the points urged have been determined adversely to the defendant in People v. Sullivan, 363 Ill. 34. In that case an original petition for mandamus was filed in the Supreme court for a writ commanding Judge Sullivan of the Superior court and ex-officio of the Criminal court to expunge from the records of the Criminal court an order releasing and discharging the defendant on a writ of habeas corpus. The Judge filed a demurrer to the petition but the court held the petition was sufficient and awarded the writ. The court there said (p. 35): "W. H. Jacobson (also referred to as William Jacobson) was convicted in the municipal court of Chicago on a charge of obtaining money by false pretenses." The court then analyzed the allegations of the information and held that it charged the defendant with the commission of the crime condemned by section 96, paragraph 220, chapter 38, Ill. State Bar Stats., 1935, and said (p. 38): "The information was not void, and it is unnecessary to consider whether it was defective. If defective a motion to quash could have been made, but no such motion was made."

It having been adjudicated that the information charged the defendant with the commission of a crime, his contention that the information is void obviously is without merit.

Since the information charged defendant with the commission of a crime, if it was defective in form he should have taken advantage of this by motion to quash. Such defects cannot be reached by motion in arrest. People v. Wooley, 275 Ill. App. 378; People v. Glassberg, 326 Ill. 379; People v. Pamilio, 359 Ill. 609.

In the Wooley case we said (p. 381): "The information may have been defective in form, but advantage of this should have been taken before the trial. Such defects cannot be reached by a motion in arrest. Par. 743, ch. 38 (Cahill). People v. Massil, 341 Ill. 286; People v. Glassberg, 326 Ill. 379."

In the Pamilio case it was contended that the indictment was insufficient because it set forth conclusions of the pleader as to a prior judgment of conviction. In disposing of this question the court said (pp.610-611): "It appears, however, that Pamilio failed to attack the sufficiency of that count prior to trial by a motion to quash. This failure precludes him from raising that question by a motion in arrest of judgment. A contrary expression has been cited to us in the case of People v. Goldberg, 287 Ill. 236, wherein it was held that a motion in arrest of judgment opened the entire record for examination, reaching any defect apparent therein; but in the more recent case of People v. Glassberg, 326 Ill. 379, we held that under section 9 of division 11 of the Criminal Code (Smith's Stat. 1933, chap. 38, p. 1101) all exceptions going merely to the form of the indictment should be taken before trial, and that no motion in arrest of judgment or writ of error, will be sustained unless it affects the real merits of the offense charged."

Defendant further contends that "An information charging Mr. W. M. Jacobson with the crime of obtaining money under false pretenses does not grant power to the Municipal court of Chicago to find and sentence William Jacobson guilty of the crime of obtaining money under false pretenses," and in support of this the case of Turner v. State of Illinois, 40 Ill. App. 17, is cited. In that case the defendants filed a plea of "misnomer in abatement" on the ground that the information charged J. B. Turner, Jr., and C. W. Turner with the offense and their plea of abatement averred that they were baptized in the names of Charles W. Turner and James B. Turner. The court, on action of the State's Attorney, struck the plea from the files. This was held error and the judgment was reversed and the cause remanded. In 12 Cyc.359, it is said, "A misnomer of the defendant in an indictment or information may and

must be pleaded in abatement, and the accused cannot, after plea of not guilty has been entered and the trial begun, be heard to object to a misnomer in the indictment." In support of this Davis v. People, 192 Ill. 176, is cited.

In the instant case no plea in abatement was filed. On the contrary, defendant entered a plea of not guilty. He is therefore not in a position to raise the point in this court.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

38969

21

UNIVERSAL CREDIT COMPANY, a corporation, Appellant, v. STANDARD OIL COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 613

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case grows out of a transaction in which a Ford truck was sold by the Ford Motor Company to Litzner Bros. upon an order of said Litzner Bros. and thereafter sold by the latter to the Standard Oil Company of Indiana located at Green Bay, Wisconsin.

The plaintiff, a finance company, aided Litzner Bros. in paying for the truck to the extent of $607.60. This suit is for the purpose of recovering that sum from the Standard Oil Co. as they have not paid for the truck, but are willing to do so whenever the court shall decide to whom it should be paid.

After suit was commenced by the Universal Credit Company, as a fourth class claim against the said Standard Oil Company, one J. E. Quinn who claims to have been an assignee of the sale price of the Ford was permitted to intervene. Judgment was entered in favor of the intervener Quinn and against the Standard Oil Company for the sum of $811.49.

The consideration for the assignment to Quinn by Litzner Bros. was for $300 in cash and an additional amount which Litzner Bros. owed to Quinn on account of goods theretofore bought by them from Quinn.

This case is one which is almost entirely controlled by the facts as shown by the evidence. Most of the evidence in the case was stipulated between counsel and appears in the abstract.

When Quinn received the assignment of the account from

Litzner Bros. on June 21, 1935, he forwarded the same to the Standard Oil Company and they acknowledged receipt of it.

It further appears from the evidence that when the Ford Motor Company sold the truck to Litzner on May 27, 1935, it was sold under a conditional sales contract. Plaintiff herein, as heretofore stated, was the finance company and furnished $807.60 for the purpose of payment on this truck. The conditional sales contract was assigned to plaintiff.

On June 22, 1935, approximately one month after the execution of the conditional sales contract the truck was delivered to Litzner Bros. at Sault Ste. Marie, Michigan. On June 24, 1935, without the knowledge or authority of the plaintiff, who then had title to the truck, or without paying the plaintiff the amount due under the conditional sales contract, Litzner Bros. delivered the truck to the Standard Oil Co. at Escanaba, Michigan.

Prior to the time that Litzner Bros. received the truck from the Ford Motor Co., about June 21, 1935, Litzner Bros. asked J. E. Quinn, who was the local agent of the Standard Oil Co. at St. Ignace, Michigan to lend them $300.00. At that time Litzner Bros. were indebted to J. E. Quinn for $513.33 and they offered to assign the moneys due for the truck from the Standard Oil Co. as security for the loan and also for the past indebtedness. To secure this loan Litzner Bros. executed an assignment of the money due for the truck to Quinn.

Intervener's Exhibit 12 which is a letter from the Universal Credit Company, dated July 15, 1935, to the Standard Oil Co. is quite illuminative and reads as follows:

> "Furthering our conversation regarding an open account basis by your Company in Green Bay, it has come to our attention that there is a prior claim to a party by the name of 'Quinn' in the amount of $300.00 against the $811.78 remittance due on this open account, in question.

[illegible]

We wish to go on record as acknowledging this as a prior claim, and it will be satisfactory if you will arrange to remit the remainder, or $511.78 when paid, to the order of our Company alone, or our Company and the Dealership.

We hope this handling meets with your approval and will appreciate acknowledgment of the manner in which it will be handled by you."

This letter shows that during the transaction all that Quinn claimed was $300.00 and we think it clearly appears that that is the extent of the amount which he should receive at this time. The Universal Credit Company claims the entire sum, but this letter, which is in the nature of an admission precludes either of them from receiving more than is therein provided.

We are of the opinion that the trial court erred in allowing the entire amount to the intervener Quinn. The Standard Oil Company offered to pay the money into court, but did not do so. Therefore, for the reasons herein given, we find that the amount due J. E. Quinn is $300.00 and the amount due the Universal Credit Company is $511.49 and judgment is entered here in favor of the intervener and the plaintiff and against the Standard Oil Company for such respective amounts, together with xxxxxxxxx interest from January 31, 1936, upon such respective sums. Costs to be taxed against the Standard Oil Company.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL AND HALL, JJ. CONCUR.

38998

2-2

HUGENIA S. DOGGETT, Appellee, v. MARGARET L. BLOCHER, et al., Defendants below, MATHEA HANSEN, Intervenor, Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

269 I.A. 613

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On March 31, 1934, Hugenia S. Doggett filed a bill to foreclose a lien, being a mortgage given to secure a note dated August 9, 1934, made by defendant, Margaret L. Blocher, in the sum of $8,000.00.

The summons was issued May 14, 1934, and an affidavit of non-residence was executed by Thurston A. Lundeberg and filed on August 14, 1934, stating "that he is one of the attorneys for plaintiff and that Mathea Hansen and unknown owners, defendants, on due inquiry cannot be found, so that process cannot be served upon them, and that upon diligent inquiry their places of residence, either present or last known, cannot be ascertained."

On October 4, 1934, an order of default was entered. Mathea Hansen, who was in default, was served by publication for failure to answer or appear and it was ordered that the complaint be taken as confessed against her.

On January 29, 1935, a decree was entered finding a total indebtedness due plaintiff of $6,187.48, and ordered that said real estate be sold to satisfy the said decree.

The appearance of I. W. Kaufman on behalf of Mathea Hansen was filed on January 28, 1936.

The petition of Helga Anderson was also filed on January 28, 1936, as the authorized agent of Mathea Hansen, the owner of the real estate. The petition further states that after the commencement

of the suit no summons was ever issued against Mathea Hansen or served on her and at no time during the pendency of these proceedings did the said Mathea Hansen have any knowledge of nor was she served with any notice by plaintiff and that the first notice she had that these proceedings were pending was in the Fall of 1935, when she was advised that foreclosure proceedings had been instituted against this property; that Mathea Hansen acquired title to the real estate on August 25, 1933 and took possession thereof in June, 1934, since which time she has been living there; that on and prior to August 14, 1934, she was living in said premises; that plaintiff and her attorneys knew she was living in said premises or could readily have ascertained the same; that the affidavit of non-residence is false and that the plaintiff and her attorney knew the affidavit of non-residence was untrue; that Mathea Hansen has been deprived of the right to appear and defend herself in these proceedings and has been deprived of the right to exercise any and all rights that she may have and that may be hers by virtue of the Laws of the State of Illinois and of the United States of America; that petitioner prays for the entry of an order, as follows: (1) striking said affidavit of non-residence; (2) vacating order of non-residence; (3) vacating decree of sale; (4) vacating decree approving master's report of sale and distribution; and, (5) allowing petitioner to appear and defend and for such other orders as the court may deem meet.

On January 28, 1936, an order was entered granting Mathea Hansen leave to file petition instanter; giving interested parties leave to file answers or pleadings; setting hearing on contested motion calender on February 17, 1936; granting Helen Abbey leave to file an intervening petition.

On February 8, 1936, Helen Abbey filed an intervening petition, in which it is alleged that on February 25, 1935 a certificate

of sale was issued to Queenie G. Secord on the premises herein involved, pursuant to a sale of said premises.

The intervening petition of Helen Abbey further alleges that petitioner purchased said certificate of sale in November, 1935, and is the assignee and owner thereof; that said certificate of sale is based upon the valid decree entered against defendants, including Mathea Hansen, served by publication.

It further appears that a motion was made to dismiss petition of Helga Anderson for the reason that said petition does not set forth the facts; that an order was entered on February 28, 1936, giving Helen Abbey leave to withdraw motion to dismiss and giving Mathea Hansen leave to file an amended petition; that said order also gave Helen Abbey leave to answer or reply to the amended petition and setting the hearing for March 13, 1936.

The amended petition of Helga Anderson claimed that she had been deprived of her right to seek relief in the United States District Court, under the laws of the United States of America and specifically under Section 74 of the National Bankruptcy Act.

It further appears that on April 11, 1936, a motion was filed to dismiss the amended petition of Helga Anderson and on the same day an order was entered by the court giving leave to Helen Abbey to withdraw answer to the amended petition of Mathea Hansen and to file instanter her motion to strike and dismissing the said petition and denying the relief prayed.

This proceeding is governed by Chapter 110, Paragraph 178, Section 50 of the Ill. State Bar Stats. 1935, which reads as follows:

> (8) When any final decree in chancery shall be entered against any defendant who shall have been served by publication with notice of the commencement of the suit and who shall not have been served with a copy of the complaint, or received the notice required to be sent him by mail, or otherwise brought into court, and such person, his heirs, devisees, or personal representatives, as the case may require, shall, within ninety days after notice in writing given him of such decree, or within one year after such decree, if no such notice shall have been

given as aforesaid, appear in open court and petition to be heard touching the matter of such decree, the court shall upon notice being given to the parties to said suit who appeared therein and the purchaser at a sale made pursuant to such decree, or their solicitors, set such petition down for hearing and may allow the parties and such purchaser to answer such petition. If upon the hearing upon said petition it shall appear that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended as shall appear just; otherwise such petition shall be dismissed at petitioner's costs; provided, however, that if a sale shall have been had under and pursuant to such final decree the court, in altering or amending such decree, may, upon terms just and equitable to such defendant, permit such sale to stand. If upon the hearing of such petition it shall appear that such defendant was entitled under the law to redeem in equity from such sale, the court shall enter its decree permitting such redemption to be made at any time within ninety days thereafter, upon such terms as shall be equitable and just."

The above act takes the place of former Section 19 of the Chancery Act, and the decisions of the courts under the old act are not in most instances applicable to cases coming under the new act.

Nothing appears in the petition which shows that the petitioner was injured in any way or sustained any damage by the entry of the decree; that the trust deed was not a lien or that the amount of the decree is not correct or that a different decree should be entered or that her rights were in any way denied her.

In petitioner's amended petition as heretofore stated she sets forth that in some way she was denied the right to take advantage of Section 74, National Bankruptcy Act, but fails to state in what way the privileges afforded her by that section would be to her advantage.

We are of the opinion that the court was right in striking the petition and for the reasons herein given the order of the Circuit Court is hereby affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

39009

23

CITY OF CHICAGO, Appellee, v. MICHAEL OHLSEN, doing business as M. OHLSEN COAL COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court finding the defendant guilty of a violation of a city ordinance and assessing a fine of $25.00 against the defendant. The case was tried before the court without a jury.

The ordinance which the defendant violated provides against short deliveries in the sale of coal by dealers to consumers.

It appears from the evidence that the Illinois Emergency Relief Commission gave an order for 19,000 pounds of coal to be delivered by defendant to ten different persons, nine of whom were to receive a ton each and the tenth person a half ton. An officer from the city followed the wagon and after the nine deliveries of one ton each had been made, the officer directed that the coal wagon be taken to the city scales to be weighed and it was found that there was still 1690 pounds in the wagon, proving a shortage in delivery of 690 pounds.

Defendant claims that he was not short in delivery, but that he was interfered with by the city officer from making the last delivery.

This case is controlled wholly by the facts and there is no question of law involved. The presiding judge heard the witnesses and was in a better position to determine the truth of their statements or lack of it and whether the plaintiff proved its case by a preponderance of the evidence, than is a court of review.

We cannot say from a reading of the briefs or the abstract that the trial court arrived at the wrong conclusion and, therefore, for the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

39088

24

MARIA STANKE, (Plaintiff) Appellee, v. ARDEN ATHERTON, (Defendant) Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

289 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court denying the vacation of a judgment entered for the sum of $20,000.00 and costs in favor of the ~~defendant~~ plaintiff and against the ~~plaintiff~~ defendant. The suit was instituted on or about January 21, 1930, returnable to the March Term 1930 in an action of trespass on the case, wherein the damages were claimed to be $20,000.00.

It is claimed that the defendant, while operating an automobile, injured the plaintiff. After the defendant had demurred and the plaintiff had changed counsel several times, the cause came on for hearing before Judge Schwaba in 1934, at which time the plaintiff did not proceed with the trial of the cause. The cause was at issue at that time, the defendant having answered that he did not own an automobile at the time it is alleged that he injured the plaintiff. Stephen Atherton, the defendant's son was originally charged with having caused this injury. Judge Schwaba caused the suit to be dismissed as to Stephen Atherton, and it is claimed that at that time the judge ordered the cause to be stricken from the trial call and directed his minute clerk to make a notation thereof and also stated that the attorneys representing the plaintiff should serve a notice upon counsel for defendant whenever they desired to have the cause again placed on the trial calendar.

The case thereafter appeared on the calendar of Judge Frankhauser before whom an ex parte judgment was entered on November 26, 1935, in favor of plaintiff for $20,000.00 on the verdict of the jury.

Defendant contends that thirty days after the entry of said judgment an execution was issued and placed in the hands of the sheriff of Cook county and that when he was served with a copy of said execution it was the first knowledge he had that judgment had been entered against him. Defendant filed a petition under the statute in the nature of a writ of error coram nobis to vacate the ex parte judgment and at the hearing on that petition evidence was introduced to show that this cause was stricken from the trial calendar, to be reinstated on notice to defendant, but that the clerk had failed to enter such order upon the records of the court. The trial court, while admitting this evidence, did not think it was competent, but decided to permit it to go into the record for the purpose of review in this court.

As to the weight of the evidence, it is quite apparent that something must have been done with the case by the trial judge when the case was reached for trial. If a case is at issue and is reached for trial, but is not tried, it must be disposed of in some way such as the granting of a continuance, or striking the case from the call, or dismissing the suit or some similar order. Otherwise, the status of the case would be left in a state of uncertainty.

When the cause came before Judge Frankhauser the plaintiff appeared, but the defendant did not appear. A jury was called, testimony heard and a verdict returned for $20,000.00 in favor of plaintiff. At that time it was the practice in the courts to prepare lists of cases under the direction of the executive committee of the court which included all "cases then pending" and to assign said lists to the judges by numbers 1 to 13 and from this list the trial judge, after the list was assigned to him, would make up the trial calendar upon

notice being served on the opposing counsel for that purpose.

The evidence here shows that on July 15, 1935, the executive committee of the Superior court entered an order the pertinent provisions of which are as follows:

> "IT IS ORDERED BY THE EXECUTIVE COMMITTEE that the Clerk of this Court be and he is hereby directed to reassign all pending and undisposed of common law jury cases as of Saturday, July 13, A. D. 1935, in rotation to thirteen (13) common law jury Lists (leaving off the names of the Judges to whom the said Lists have been assigned, said Lists to be known by number only); provided, however, that all common law jury and non-jury causes that have not been noticed for trial within two years from the time of their commencement or from the date of the last order entered therein, as of Saturday, July 13, A. D. 1935, shall be placed on a Special Common Law Calendar.

Rule 22 of the Superior Court provided:

> "Sec. 1. Each Judge, from time to time, shall cause to be prepared a trial calendar of causes assigned to him which have been noticed for trial in the manner hereinafter stated; and no cause shall appear on the trial calendar of any judge which has not been so noticed for trial.
>
> Sec. 2. At any time after a cause is at issue either party may serve upon the other a notice to the effect that he desires the cause placed upon the trial calendar of the Judge to whom the cause stands assigned. Such notice, with proof or acknowledgment of service, shall be filed with the minute Clerk of the Judge, or during the Summer Recess with the Clerk of the Court, within five days after its service. In other respects such notice shall be governed by the provisions of Rule 17 so far as applicable."

It must be at once apparent that it was intended by the rules of the court and the order of the executive committee that no case should be placed upon any trial calendar until notice had been served on the opposite counsel. To hear a cause without permitting each side to have an equal opportunity to be heard, in the absence of negligence, could not be construed as evenly administering justice. Where parties to a law suit file their pleadings, employ counsel and have been guilty of no negligence, courts should be diligent in seeing that no advantage is taken by one side over the other. It is true that in order to dispatch the business of the court in centers of large population, it is necessary to be insistent that trials take place at the time set for same, otherwise court calendars would become congested.

Counsel for plaintiff contends that one cannot prove the misprision of a clerk by oral testimony. While it is true that courts are strict in not permitting orders to be changed, altered or entered by oral testimony, there is no rule which prevents parties from showing what actually happened in court if they do not seek to change an order already entered or ask for an order to be entered.

In the instant case we do not believe that the trial court knew that the executive committee had entered an order assigning this case to a list for trial which could not be tried without notice. No notice thereof appears in this record and if the trial court had known no notice had been given, it would not have entered a default judgment.

On the hearing of the petition in this case apparently the court felt that thirty days having elapsed, he had no jurisdiction to hear this petition. In a proper case, under the practice in this state, the courts are not so limited. As was said in the case of The People v. Long, 346 Ill. 646, at page 650:

> "Errors of fact which could have been availed of on a writ of error coram nobis can now be availed of under a motion or petition filed pursuant to the provisions of section 89 of the Practice Act. The motion is an appropriate remedy in criminal cases as well as in civil cases. It not only lies to set aside a conviction obtained by duress or fraud, but it also lies to correct some excusable mistake or ignorance of the accused, where, without negligence on his part, he has been deprived of a substantial defense which he could have used at his trial. People v. Crooks, 326 Ill. 266."

That no notice was given after Judge Schwaba ordered the case stricken from the calendar and the placing of the case upon Judge Frankhauser's calendar in violation of section 4 of rule 22 of the Superior Court, were matters of fact not appearing upon the record. It was proper to show what had happened before Judge Schwaba, or at least what defendant believed had happened, as an error of fact unknown to Judge Frankhauser at the time he rendered the judgment. As was said in the case of Rosenthal v. Wald, 252 Ill. App. 383,388:

"The fact which was unknown to the trial judge was a misprision of the clerk in not, under the order, striking the cause from the short cause calendar, putting said cause at the foot of the docket.

In Chapman v. North American Life Ins. Co. 292 Ill. 179, it was held inter alia that error in the process or through the default of the clerk, which is not sufficient to preclude the judgment, but which was unknown to the court at the time the judgment was rendered and does not appear on the face of the record is sufficient to reverse or recall the judgment under a writ of error coram nobis. The error of the clerk in not having placed the cause at the foot of the docket was an error of fact unknown to the trial judge at the time of the trial when the judgment was entered. Cramer v. Illinois Commercial Men's Ass'n., 260 Ill. 516.

In Brady v. Washington Ins. Co., 82 Ill. App. 380, it was said:

'A default of the clerk is one of the recognized grounds for a writ of error coram nobis. * * * '

In Holbrook v. Lawton, 207 Ill. App. 497, the court said:

'The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court.'"

The facts urged by the petitioner in his petition are that the defendant was not driving the automobile involved in the accident in question and was not the owner of the automobile and that the said automobile was not being driven in furtherance of defendant's business; that defendant was not riding in said automobile and had nothing to do with it.

We think the facts in this case bring it within the purview of the act passed by the General Assembly in lieu of the writ of error coram nobis, Sec. 200, Chapter 110, Ill. Bar Stats. 1935, and we think the judge should have exercised his discretion and set aside the judgment and permitted the defendant to have his day in court and in denying the relief prayed for in the petition committed error. Sufficient was shown by the petition to entitle the defendant to be heard in his own defense, no negligence being attributable to him.

As was said in McMurray v. Peabody Coal Company, 281 Ill. 218, 226:

"We think plaintiff in error has in this case shown a reasonable excuse for not being in court at the time judgment was entered; that it had a meritorious defense and used due diligence in presenting its motion, and that there was an

39089

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GEORGE A. TETZLAFF, JR., a minor, 5 years of age by his father and next friend, George A. Tetzlaff,	APPEAL FROM
Plaintiff - Appellee,	SUPERIOR COURT,
v.	COOK COUNTY.
EDWARD E. LICKTON,	
Defendant - Appellant.	289 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court granting plaintiff a new trial. The cause was one for personal injuries sustained by the plaintiff George Tetzlaff, Jr., a minor, he having been struck by plaintiff's automobile. The verdict of the jury found the defendant Edward E. Lickton not guilty.

Defendant testified substantially as follows: That he is a garage owner and that he was driving an automobile west on Washington Boulevard in Oak Park, Illinois; that he had lived in Oak Park for fifty years and was familiar with the fact that at the northeast corner of Clinton street and Washington Boulevard there was a school and that children passed back and forth across Clinton street on their way to school; that on November 2, 1934, he was driving an Oldsmobile sedan; that as he approached Clinton street he saw 14 or 15 women and children, one of whom was the plaintiff aged five, and they were at the crosswalk walking across Washington Boulevard; that he stopped his car at Clinton street but started it again and ran over plaintiff; that "they", meaning the women or some of them, told him or signaled to him to go ahead so that they could cross after he went by; that no policeman was there to direct traffic; that he started up his automobile and the plaintiff jumped in front of it and the car ran over him.

It is claimed by the plaintiff that when defendant's automobile stopped, the boy continued to cross the street, whereupon

defendant suddenly started his automobile and struck the boy which resulted in seriously injuring him.

On the motion for a new trial plaintiff called the attention of the court to the fact that the verdict was against the manifest weight of the evidence and that error was committed by the court in refusing the following instruction to the jury:

> "The defendant in operating his automobile was required to exercise ordinary care for the safety of the plaintiff, and the fact, if you find it to be a fact that some person not a police officer or other official authorized to direct traffic gave a signal to the defendant, and the defendant acted upon the same and thereby injured the plaintiff, such signal, if any, would not relieve the defendant from liability if he was negligent as charged in the plaintiff's complaint."

It appears that the defendant, over the objection of plaintiff and the rulings of the court, insisted in getting before the jury the fact that some unnamed person told him or motioned for him to go ahead. This conduct on the part of the defendant in not complying with the rulings of the court occurred several times during the trial.

From the facts before us we are of the opinion that the trial judge in the exercise of his discretion was justified in granting a new trial.

For the reasons herein given the order of the Superior Court granting a new trial is hereby affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

26

38754

LARS LINDQUIST, Plaintiff - Appellee, v. HERMAN L. SCHMIDT and AUGUST SCHMIDT, doing business as SCHMIDT BROTHERS GARAGE, Defendants - Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

289 I.A. 614

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Circuit Court of Cook County against them for the sum of $5,000.00. The action is based upon a charge that plaintiff suffered severe injury in an automobile collision, as a result of defendants' negligence. The grounds urged for reversal are that the plaintiff was guilty of contributory negligence at the time and place in question, that the verdict is excessive and contrary to the manifest weight of the evidence, that in the trial of the cause, plaintiff's counsel was guilty of misconduct in the examination of witnesses, and that the court erred in refusing to give certain instructions offered by defendants.

The record indicates that at about 7 o'clock on the evening of December 11th, 1933, plaintiff was riding in a car driven by his brother, Oscar Lindquist, in a southwesterly direction on Archer Avenue in the Village of Justice Park, which lies southwest of the City of Chicago. The testimony of Oscar Lindquist, the driver of the car, is to the effect that he, the plaintiff, and another person, were proceeding in an automobile along the westerly lane of the two lane highway on Archer Avenue, at the rate of about 35 miles an hour, with the lights lighted on their car, so that he could see a distance ahead of 35 to 40 feet, and that the road ahead seemed to be clear of any obstruction; that it was dark at the time, and that suddenly an object pulled across the road in front of the car; that the car which he was driving, struck this object which

pulled across the portion of the roadway upon which he was driving, that he afterwards learned the object was a truck; that the car in which the witness was driving struck the front end of the truck and was thrown off to the right side of the road and onto the street car track, which is parallel with the roadway; that at this time there was no light, headlight or signal "showing toward us"; that the night was foggy and dark, that the road was dry, and that when he first saw the truck, it was 8 or 10 feet in front of him. Plaintiff testified, in substance, that at the time of the accident, he was riding in the front seat of the car with his brother Oscar, and that another man was in the back seat; that the truck with which they collided was a tow truck, which, at the time of the collision, had just pulled over the black line in the center of the roadway, three or four feet; that up to the time of the collision, he, plaintiff, had not seen the truck nor any lights therefrom, nor had he seen any signal or flash light exhibited by anyone in the neighborhood of the truck; that he afterwards learned that the truck's headlights were shining away from the direction from which the car in which the plaintiff was riding, was proceeding; that as a result of the collision, he received a cut on his fingers and on his head, and that he was taken to a hospital, where he was attended by a physician.

The evidence indicates that the defendants operate a garage a short distance southwest from the place where the accident occurred, and that shortly before the accident, they had been notified that an automobile had gone into a ditch on the east or opposite side of Archer Avenue from the point where the accident in question occurred; that the point where this car was in the ditch was about 400 feet away from defendant's garage, and that one of the defendants took his tow truck to this place. The defendant, August Schmidt, testified that his tow truck is about 11 feet in length, and that upon it at the time, were two headlights, with three green lights in front and four red lights in the rear. This

defendant also testified that he backed the tow truck up to the southerly side of Archer Avenue in order to hook a chain over the car which was then in the ditch, and that at that time, no part of his tow truck was over the black line running along the center of the highway; that the motor of the tow truck was running, that a police officer who stood about 50 feet away from him on the pavement had a flash light, that another man had a flash light a short distance from his car, and that both of the flash lights were lighted and shining; that the car of plaintiff came along at a pretty good speed, crossed over the black line, and ran into the tow truck. The evidence of all the witnesses to the accident indicates that shortly prior to the accident, the lane in which the car in which plaintiff was riding, was clear.

Robert Graham, a witness on behalf of plaintiff testified, in substance, that he resided in and was a trustee of Justice Park; that he was a machinist, that he was friendly with the defendants, and that he was familiar with the locality where the accident took place; that on the evening of December 11th, 1933, at about 7 o'clock he stopped his car at the garage of the defendants to purchase gas, and thereafter turned into Archer Avenue and was proceeding north-east along the right hand roadway of Archer Avenue; that he then saw a tow truck getting ready to pull a car out of a ditch; that at that time, his car was headed northeast, and the tow truck was directly across the roadway upon which he was proceeding, which caused him to stop; that at that time, the back of the tow truck was towards the east and the front towards the west, and that he saw people standing around, but saw no lights; that the tow truck backed off toward the east edge of the road to pull the car out of the ditch, and that he heard someone say, "Give it the gas"; that the tow truck then gave a tug and pulled over about four feet, that at that moment, he heard a crash, and that at that time, the tow truck was over about four feet in the right hand or opposite

lane of the highway of Archer Avenue; that the crash was caused by a collision of a car that was coming from the northeast, with the truck, and that at that time, the tow truck was in front of the witness and on the wrong side of the road, that it blocked the lane upon which the witness was driving and about four feet of the southwest lane; that at that moment, the truck was between his car and the car that was coming from the northeast; that he knew both Oscar and Lars Lindquist; that after the accident, Lars Lindquist seemed to be scared and shaken, that his hand was cut, and that he was holding his hand up to keep the blood back; that he, the witness, got his own flash light, which was the only flash light there at the time, looked into the wrecked car and saw a man bleeding to death on the floor of the car in which the Lindquists were riding. This was the person who rode in the rear seat of the car in which plaintiff was riding, and who was killed by the collision. On cross examination, Graham stated that "The truck moved forward across the road, that the crash came just a little after the truck made a lunge", and that he did not detect any intoxicating liquor on the Lindquists' breath, and that neither of the Lindquists showed any evidence of being intoxicated. This witness also stated that after he had stopped his car, because the roadway on which he was proceeding, was blocked, and just before the collision, he saw three or four men just walking around.

Anna Graham, the wife of the last mentioned witness, testified that she was riding with her husband in his car at the time of the accident; that the night was hazy; that she saw no flash light, lantern or other signal to any car coming on the highway; that she saw a car belonging to a man named Chernaukas with one bright light, which was shining west towards the Schmidt garage, and that this light was near the gas station, and that this was the only light she saw; that just before the accident, she heard the expression

"Give her the gun"; that the motor of the tow truck started, and that the tow truck then went over into the right hand lane of the roadway, and that she then heard a crash. On cross examination, this witness testified that she saw the plaintiff after he got out of his car, and that he was bleeding from his head; that at the time of the accident, it was "getting dark and getting ready to snow".

A police officer of the Village of Justice Park, produced by the defendants, testified to the effect that on the night of December 11th, 1933, he received a call that a car was in a ditch, and that he went over to the place where this car was with a man named Chernaukas; that the defendant's tow truck arrived upon the scene shortly after the witness; that he saw four or five other persons there; that it was a clear night, not foggy but dark; that the tow truck had two headlights, three red lights and a tail light, all lighted. This witness then described what was done in connection with the tow truck in making preparation to pull the car out of the ditch. He testified that he heard the roar of a car coming from the northeast, and that when he first saw it, it was 150 or 200 feet from where the witness was standing, which was near the tow truck, and that this car was then coming at a speed of about 45 miles an hour; that the witness rushed up and waved a flash light, but that the car referred to did not slow up; that he then heard the crash, and that this car ran right into the side of the tow truck at the cab, and went off of the road to the right and into the ditch; that Oscar Lindquist had liquor on his breath, and that the witness took him over to the station and locked him up and sent for a doctor to examine him. On cross examination, this witness stated that just before the collision, he was flagging traffic coming from the southwest, and that he was about 8 or 10 feet southwest of the truck. The doctor, referred to by this witness, was not produced at the trial.

Several of defendants' witnesses testified that after the

tow truck was placed in position to pull the car out of the ditch, and prior to the collision, it had not moved. Others testified that it moved about one foot. Several witnesses produced by the defendants testified that just prior to the accident, a man was standing on the right portion of the highway, and near the truck, signalling with a flash light in the direction from which the car in which plaintiff was riding, was proceeding. One of defendants' witnesses testified that the nearest street light was about a block from the place where the accident occurred. The testimony of all the witnesses indicates that the front lights on the tow truck were directed away from the direction from which plaintiff was proceeding. Oscar Lindquist, the driver of the car, admitted that he had had a drink a short time prior to the accident, but denied that he was intoxicated.

Dr. Paul Headland testified, in substance, that he first attended the plaintiff at the Little Company of Mary Hospital on December 12th, 1933; that he found an injury to plaintiff's scalp on the left side, which he described as a long lateral incised wound, a cut extending from the posterior edge of the temporal on through and across the parietal, two and a half or three inches long; that the wound went down to the scalp and was bleeding, that he cleaned the wound out and cauterized and sutured it; that he found a laceration of plaintiff's left hand extending across the back of the middle portion thereof, that the hand was badly torn and cut and involved the skin and tissues below, down through the tendons; that the tendons controlling the middle and ring finger were completely severed, that he cleaned the cut and sewed the ends of the tendons together, but that they did not stay together and that regeneration occurred, which was a very slow process; that the plaintiff was under his care until the first of the February following; that the wound in the head healed and caused no further trouble, and that there was no evidence of

skull fracture, and only a mild degree of concussion. He also testified that the plaintiff complained of pain as a result of the laceration of the scalp. This doctor further testified that there is always some abnormal situation following any suturing of tendons, because of the forming of scar tissues and that after the healing of such an injury, there is not the same smoothness, nor does it perform the same functions; that when he last examined the plaintiff, there was evidence of scar tissues, and that as a result, the hand could not be properly closed, that although the fingers could flex, they could not do so completely, and that his estimate was that there was approximately two percent impairment of flexion. This doctor testified that the fair charge for his services would be $150.00, but that in this case, he only charged $51.00, and that the hospital charges were $3.00 per day.

As to the extent and effect of his injuries, plaintiff testified, in substance, that he is a bricklayer by trade; that after his injury, and about the first of March following, he attempted to resume his work, but that his hand got so stiff that he "couldn't keep it up"; that at that time, he worked for about twenty minutes and stopped, that he tried to do this work again about four months previous to the trial and that his hand "got stiff every time", and that before the accident, he had no trouble in laying brick. On cross examination, he testified to the effect that after he quit laying brick, he did labor work, such as shoveling, that he had been shoveling mortar and that he worked as a bricklayer's helper, handling mortar and mixing mortar with a hoe, that after he mixed the mortar, he used a shovel and placed it in a wheel barrow and then conveyed it to the place where the bricklayers used the mortar. He further stated that four months prior to the trial, he attempted to lay brick again, but that his hand did not respond to the handling of the brick, so that he was compelled to go back to the business of mixing mortar.

and then conveyed it

Defendant complains of four instructions tendered by his counsel and refused by the court. They are numbered 1, 2, 3 and 4. Instruction, No. 1, is so inartificially and carelessly drawn, that, therefore, it was properly refused. Instruction No. 2 is as follows:

> "This court instructs the jury that the statute of this state provides that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

This instruction is apparently predicated upon the theory that the evidence establishes the fact that the driver of the car in question, at the time and place in question, drove the car "at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person", when, as a matter of fact, there is a contrariety of evidence as to whether the car in which plaintiff was riding, was being driven at a speed of from 30 to 40 miles an hour, or at a much greater speed. If this instruction is intended to instruct the jury as to the contents of Section 324, Chapter 121, Illinois State Bar Stats. 1935, which defines ~~xxxxxx~~ the reasonable speed for automobiles under various circumstances, it is lacking in many material respects, as a perusal of the statute will indicate. Instruction No. 3 offered by defendant, which the court refused and to which refusal defendant objects, contains the following:

> "If you believe from all the evidence in this case that the motor vehicle in which the plaintiff was riding at the time in question was being driven on a public highway in the State of Illinois and in violation of the statutes of Illinois regulating the traffic of vehicles upon such streets and highways; and if you further believe from all the evidence that the plaintiff knew or, in the exercise of ordinary care on his part could have known, of such violation of the law by the driver of the vehicle he was riding in a sufficient length of time before the collision here in question to have cautioned the driver of the automobile plaintiff was riding in not to violate said statutes, or to have prevented said driver from violating said statutes; then the court instructs you that so driving said vehicle in which plaintiff was riding contrary

> to said statutes raises the presumption that the plaintiff and the driver of the motor vehicle in which plaintiff was riding, at the time and place in question, were, as a matter of law, guilty of negligence; and if you further believe from the evidence that such negligence was the proximate cause of the injury to the plaintiff, without which the injury would not have happened, then you should find the issues for the defendants."

This instruction does not pretend to state what the statute provides. The only method by which the jury could determine whether the driver of the automobile in which plaintiff was riding, was, or was not, violating the law at the time and place in question, would be for the jury to take a copy of the statutes of the State of Illinois with them into their jury room, and then determine, after reading it, whether or not the driver of the car in which plaintiff was riding, had, by his manner of driving, violated the provisions of such statute. Instruction No. 4, which was refused by the court and upon which action of the court defendant assigns error, is as follows:

> "You are hereby instructed that before the plaintiff can recover in this case from the defendants, he must prove by the preponderance or greater weight of the evidence that the defendants' driver had notice, or by the exercise of ordinary care, could have had notice, of the dangerous position that plaintiff was in, long enough before the accident was inflicted to enable the defendants' driver to form an intelligent opinion as to how the injury might be avoided and apply the means for avoiding such injury. If you find from the evidence in this case that the defendants' driver did not have such notice, and by the exercise of ordinary care could not have had notice long enough before the plaintiff was injured by the automobile truck to form an intelligent opinion as to how the injury might be avoided and apply the means of avoiding it, then you are instructed that the plaintiff cannot recover."

This instruction was evidently lifted bodily from some opinion, and has no relationship whatever to the facts in the case at bar. There is no suggestion in the evidence that defendants' truck was being driven along a highway. On the contrary, all the witnesses testified to the effect that immediately before the accident, the tow truck was standing still, and that if it moved at all, the extent of its moving was from one to four feet.

Upon the question as to whether or not plaintiff was guilty of contributory negligence, and whether or not the verdict

is contrary to the manifest weight of the evidence, we again call attention to the following: The driver of the car and the plaintiff both testified that they were driving in the right hand roadway of the road, which appeared to be clear, and that suddenly the truck moved over into this roadway without warning, and that they crashed into it. Two apparently disinterested witnesses testified that they were standing still watching the operation of pulling a car out of the ditch, conducted by defendants, when, at the command of someone, the tow truck suddenly started and pulled into the opposite roadway about four feet, and that they immediately thereafter heard the crash. Witnesses for the defendant, as already stated, testified that if the car moved at all, it did move more than a foot. Witnesses for the defendant also testified that signals were given to warn the driver of the car in which plaintiff was riding, and other witnesses testified, just as positively, that no such signals were given. Because of the contrariety of the evidence upon the issues involved, the questions as to whether the driver of the car was guilty of negligence or not, whether plaintiff was guilty of contributory negligence or not, and whether defendant's act in moving the tow truck was or was not the proximate cause of the injury, were all questions for the jury to consider and determine from the evidence submitted. On the question as to the misconduct of counsel for plaintiff, we have carefully examined the record, and we find nothing in it which would justify a reversal. However, a careful perusal of the testimony of both the attending physician and the plaintiff leads us to the conclusion that the verdict is excessive. Dr. Headland, as already stated, testified, "I would guess approximately there was a two per cent impairment of flexion there - two per cent missing. In time we always hope it will be completely overcome. There is no possible way of telling." If a remittitur of $1,500.00 is made from the amount of the judgment within ten

days of the filing of this opinion, then it is the order of this court that judgment be entered here against defendant for $3,500.00. Otherwise, the cause will be reversed and remanded for a new trial.

IF REMITTITUR OF $1,500.00 IS MADE WITHIN FIFTEEN DAYS FROM FILING OF THIS OPINION, THEN JUDGMENT IS ENTERED HERE AGAINST DEFENDANT FOR $3,500.00. OTHERWISE, CAUSE WILL BE REVERSED AND REMANDED FOR A NEW TRIAL.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38807

LOUIS D. GOODMAN,

Appellee,

v.

FRED PARKER and HARRY S. PARKER, SR.,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

27

289 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff, Louis D. Goodman, brought suit in the Superior Court of Cook County against the defendants, Fred Parker and Harry S. Parker, Sr., for certain commissions alleged to be due him as a salesman under an oral contract made with the defendants. The cause was submitted to a jury, which returned a verdict in favor of plaintiff for the sum of $10,668.23, upon which the judgment appealed from was entered. Various questions are raised here, but from a review of the record, we conclude that except as to an alleged accord and satisfaction, suggested by defendants, as noted hereafter, the questions to be considered are wholly questions of fact.

Plaintiff testified to the effect that at the time of his employment by defendants, they were in the business of manufacturing and selling neon signs; that about April, 1933, he met defendant Harry Parker, Sr., at defendant's factory after an appointment had been made with Parker; that after a conversation regarding plaintiff's ability as a salesman, Parker stated that he desired the services of plaintiff to wait upon prospective customers, to ascertain what, if any, character or kind of signs such prospective customer might desire, and that then plaintiff should make a sketch of such proposed sign, that Parker would then make an estimate of the factory cost, including defendant's profit, to be determined by Parker, and that "on top of his factory cost (and profit) add ten per cent commission, to which I would be entitled", and that if any other salesman of the defendant corporation had been "working on" any prospective customer, such salesman would be entitled to priority of right to the commission

earned in case a sale was made, but that in case plaintiff assisted in closing a deal, he would then be entitled to one half of the commission to be paid. Plaintiff further testified that his arrangement with Parker was to the effect that, if orders were mailed to the Flashtric Sign Company, (the title under which the defendants conducted their business) for the plaintiff, the plaintiff would be entitled to his commission, and that he, the plaintiff, started to work under the arrangements as suggested.

From plaintiff's statement of his case here on appeal, and from his testimony, we conclude, that although he testified that he secured business from various persons and corporations, his claim here is based entirely upon commissions claimed to be due him on account of neon signs sold by the defendants to the Joseph Schlitz Brewing Company of Milwaukee, Wisconsin. As to this institution, plaintiff testified, in substance, that in May, 1933, he ascertained that the Schlitz Beverage Company, as it was then called, was in the market for signs; that at defendants' suggestion, he called upon a representative of that company at their office in Chicago, and was there referred to the representative of the company in Milwaukee; that on May 8th, 1933, he wrote to this Milwaukee representative in the name of the Flashtric Sign Works, the name, as stated, under which defendants operated, enclosing advertising matter; that in reply, a letter addressed to the Flashtric Sign Works was received, in which it was stated that the Schlitz Company would give this institution an opportunity to figure on signs, and that after the receipt of the letter by Parker, he, Parker, stated to plaintiff that he, plaintiff, should keep after the Schlitz Company, and that Parker would help him on the deal. A letter from the Flashtric Sign Works, signed by Louis D. Goodman, plaintiff, dated July 8th, 1933, and addressed to Mr. Wheeler of the Schlitz Company was offered and received in evidence, in which a request was made that an appointment be made with

the agent of the Flashtric Sign Works to meet a representative of the Schlitz Company in Milwaukee, to which an answer was received from the Schlitz Company, suggesting that a representative of the Flashtric Sign Works meet their Chicago representative in Chicago. The record indicates that shortly thereafter plaintiff did meet and consult with a representative of the Schlitz Brewing Company, and that thereafter the Schlitz Brewing Company purchased a quantity of neon signs from the defendant company.

The bookkeeper of the defendants, offered as a witness by plaintiff, testified that "the orders we have received from the Schlitz Brewing Company prior to December 14th, 1933, for signs total $75,023.71, and the orders we received for parts prior to December 14th, 1933, total $108,569.00. I have made a calculation of the total orders that were received by the Flashtric Sign Works from the Schlitz Brewing Company up to and including March 23rd, 1934, and in addition to those orders I have already given, the orders for signs total $20,410.00, and the orders for parts total $36,470.00."

Plaintiff resigned his position with the defendant company in December, 1933. He testified to the effect that at that time, he had a controversy with Mr. Parker about certain claimed and unpaid commissions on the account of the Schlitz Brewing Company, and that Parker said to him, "I have no time. If you want to, I will give you $50.00, the cost of oil or telephone calls and the running around you may have done on this Schlitz proposition"; that Parker then gave plaintiff a check for $50.00, and that the witness said to Parker, "Well, if that's all I am getting, there is no use for me working here any longer." This testimony is not disputed. Plaintiff insists that while he was in the midst of the negotiations with the Schlitz Brewing Company with the purpose of obtaining orders from this institution for signs, the defendant, not acting in good faith, but with the purpose of avoiding the payment of commissions to plaintiff,

and without notice to him, revoked his authority to continue negotiations with the Schlitz Brewing Company, and himself concluded the sale to this institution of large quantities of signs at various times. This is not denied by defendants. Plaintiff insists, that nevertheless, he was the efficient and procuring cause of these sales, and that he was entitled to commissions upon all orders for signs obtained from the Schlitz Brewing Company by the defendants, including orders received after plaintiff's resignation, on December 14th, 1933.

Defendants, on their part, take the position that plaintiff was not the efficient procuring cause of the sales, but that the sales were made by defendants in good faith through another salesman named Frisch, acting independently of plaintiff; that Frisch, alone, was the efficient procuring cause of the sales, and was entitled to and paid the commissions thereon, and that, in any event, plaintiff's claim being unliquidated and disputed by them, was satisfied in full by them prior to the commencement of the suit by the receipt and acceptance by plaintiff from defendants of the check for $50.00 in full satisfaction of his claim. There was no receipt or other document made by plaintiff to indicate that this was in full satisfaction of his claim.

Defendants filed a counterclaim, in which they seek to recover from plaintiff commissions alleged to have been overpaid. We find nothing in the record to indicate that they attempted to support this claim.

Defendant, Harry Parker's testimony with regard to his firm's relations with the Schlitz Company, indicates that he made the arrangement with plaintiff with regard thereto, as stated, and that after plaintiff had made a number of calls upon the representative of the Schlitz Brewing Company in Chicago, he, Parker, had a number of conferences with various representatives of that company;

that shortly after plaintiff entered his employment with defendants, and at a meeting between the defendants and various salesmen employed by the defendants, held in May or June, 1933, concerning disputes between these salesmen as to which should receive commissions in a case where a number of them had been working on what is referred to as a "prospect", meaning a person or institution to whom or which they were expecting or endeavoring to sell signs, and that the result of these conferences was that the salesmen were directed by Parker to keep the defendants informed as to which of their salesmen were seeking to sell signs to the same customer, and that it was then agreed among the salesmen and Parker that Parker should assign to the work of closing the deal to the salesman whom he determined should be entitled to the commission after the deal was closed, and that it was further agreed among the salesmen, including plaintiff, and acquiesced in by Parker, that in the event that two or more salesmen were working on the same deal, that the commissions should be divided equally between them. Plaintiff's testimony indicates that Parker's version of this agreement between defendants and the salesmen, is correct.

Another method adopted by defendants, and agreed to by the salesmen, was to cause a box to be placed in defendants' office, in which the various salesmen deposited a notice or memorandum of their so-called "prospects", for the purpose of determining just which of such agents might have a prior claim to commissions in case several agents called on the same "prospect". It is in evidence, and not disputed, that the plaintiff's card, containing a notation, indicating his effort toward making sales to the Schlitz Brewing Company, was the first of a number of cards deposited by the salesmen, indicating their efforts in the same direction, and that plaintiff's card remained in such box until his relations with the defendants were

severed. During practically all the time that plaintiff was associated with the defendants, the evidence indicates, he was engaged in an effort to sell signs to the Schlitz Company, and that after plaintiff (to use a phrase of plaintiff's counsel in their brief) "had contacted" the Schlitz Brewing Company, an agent of defendant's named Frisch was engaged in the same work, and that he, Frisch, "contacted" the general purchasing agent of the Schlitz Brewing Company. The record shows that several other salesmen of defendant's "contacted" the Schlitz Brewing Company, and there is a great contrariety of testimony as to just who was responsible for closing the contracts with this corporation. We are not informed as to whether or not plaintiff was ever paid any commissions on account of the signs sold to the Schlitz Brewing Company. We therefore, indulge in the presumption that he was not.

A witness on behalf of plaintiff named Stone testified that in October, 1933, he made a trip to Milwaukee with Harry Parker, one of the defendants, and interviewed the general manager of the Schlitz Brewing Company. Stone was a manufacturer of sheet and metal products used in advertising signs, and the record indicates that he had done a great deal of work for the defendants. Stone testified that on this trip, Parker told him that "one of his (Parker's) salesmen, a Mr. Goodman, had 'contacted' the Schlitz Brewing Company, and that he (Parker) was going to take care of him in some manner", and that "The commission (to which Parker referred) was a commission on signs sold to the Schlitz Brewing Company by a salesman who was responsible for them getting the order". Parker does not deny that he made this statement.

Frisch, the defendant's salesman to whom the record indicates the commissions on the Schlitz Brewing Company's sales were paid, testified, in effect, that about October, 1933, he "contacted" the general purchasing agent of the Schlitz Brewing Company and

induced him to come to Chicago; that he talked to him almost every day, and had considerable correspondence with the Schlitz Brewing Company. In connection with this witness's testimony, there was offered in evidence various statements by the defendants' institution, the Flashtric Sign Works, showing a large amount of commissions paid to the witness. His testimony indicates that it was long after the plaintiff "contacted" the Schlitz Brewing Company, that this witness was put on the job.

A number of witnesses were produced on each side, and, as suggested, the record is confusing as to just which of several persons, including plaintiff, secured the Schlitz business. The jury saw and heard these witnesses, and we are of the opinion that upon the question alone as to whether or not plaintiff had or had not earned the commissions claimed, the evidence to which we have referred, is sufficient to justify the jury's verdict. The further question to be determined, however, is whether or not the payment of the $50.00 to the plaintiff amounted to an accord and satisfaction. On this question, defendants contend that where a claim is unliquidated and that there is a bona fide dispute as to the sum actually due, or a bona fide doubt or controversy as to whether anything is due, then an accord and satisfaction may be established, and the adequacy or inadequacy of the payment is immaterial and will not be inquired into, and among other cases, cite that of Kall v. The W. G. Block Co., 319 Ill. 339, where the Supreme Court of this state says that "where there is a bona fide dispute between a debtor and creditor as to how much is due, a payment of the amount claimed by the debtor in full settlement, if accepted by the creditor, is a satisfaction of the claim." From the record in this case, we must conclude that plaintiff had no method of ascertaining what amount, if any, was due and payable to him on account of these commissions, except from defendant's records. From the undisputed testimony as to what defendant Parker said to plain-

tiff when he demanded an accounting for commissions claimed on the Schlitz Brewing Company orders, we gather that Parker indicated to plaintiff that he would pay him no such commissions, but that he would pay him for any expense that plaintiff might have incurred in securing, or attempting to secure, the business of the Schlitz Brewing Company. It, therefore, cannot be said that the check given to and accepted by plaintiff was an accord and satisfaction of plaintiff's claim for commissions. By this testimony, it is shown that it had no relation whatever to the matter of any claimed commissions, but was only for certain expenses incurred by plaintiff. The many cases cited by defendant are not in point. This defense is without merit, and the judgment of the Superior Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38834

BRAINERD AUTO SALES, INC., a corporation, Appellant, v. STUDEBAKER SALES COMPANY OF CHICAGO, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered in an action of replevin, brought by plaintiff against defendant to recover possession of a DeSoto sedan automobile. The trial court found for defendant.

Plaintiff claims title to the car by reason of the assignment to it by Paul A. Brown, of Brown's certificate of title thereto.

Brown, a witness for plaintiff, testified, in substance, that on September 10th, 1935, he visited plaintiff's place of business, and there talked with a salesman named Murray about purchasing a new Dodge automobile from plaintiff, and that while in plaintiff's place of business, he signed an order for the car, which was offered and received in evidence. This document, as introduced by plaintiff, indicates that Brown authorized plaintiff to enter his order for a Dodge Coupe at a price of $776.69, which included certain accessories, among which is noted safety glass, at a price of $7.80. Also, there is a recitation in this document to the effect that Brown agreed that the Dodge car was to be purchased by him subject to the manufacturer's warranty, and that the price quoted was for immediate delivery, that the order was not to be binding until authorized by an officer of the Brainerd Company, and the credit O.K'd. by a finance corporation. Brown also testified that when he signed the order, the price fixed thereon was $768.86, but that after the order was delivered to Murray, the salesman for plaintiff, and without Brown's knowledge or consent, Murray added to the amount originally agreed to be paid,

the sum of $7.80 as the price for shatter proof glass, making a total price of $776.69; that after the order was signed and Brown's certificate of title to the DeSoto car had been assigned to plaintiff and delivered to Murray, he again saw Murray at plaintiff's place of business, and that Murray told the witness that plaintiff had a car for him which he exhibited to plaintiff, and for which car an extra charge had been made for the shatter proof glass, and that Brown then told Murray he would not pay the extra amount, that he then requested the return of his certificate of title from Murray, and that Murray then told him that this certificate had been sent to Springfield. Brown further testified that thereupon he declined to purchase the Dodge car, and that Murray told him that the DeSoto car belonged to the plaintiff; that he, Brown, then made application to the Secretary of State for a duplicate certificate of title, which he subsequently received, and that thereafter he traded the De Soto car to the Studebaker Sales Corporation, the defendant here, as a part payment for a Studebaker car, and that he delivered the DeSoto car, the subject of this suit, to the Studebaker people on or about September 27th, 1935. Brown further testified to the effect that Murray told him that the order signed by him was just a sales slip form, and that Murray stated to Brown that the reason he wanted Brown's certificate of title assigned to plaintiff, was because he, Murray, wanted something "to work on"; that it was agreed that Brown should retain possession of the car; that the car had been in his possession during all the time and until he delivered it to the Studebaker company, and that plaintiff never demanded possession off the DeSoto car from him.

Murray testified that he was the sales manager of the plaintiff company; that he exhibited the Dodge car to Brown, that Brown signed the order for the purchase of the car and delivered his certificate of title to the DeSoto car owned by Brown, to the witness

on September 10th, 1935; that Brown afterwards came to the witness and told him he had decided he could not afford to buy the Dodge car; that neither the witness nor plaintiff ever had possession of the DeSoto car, and that the Dodge car which the plaintiff had agreed to sell to Brown, was afterwards resold by the plaintiff company.

It is in evidence, as stated, that after Brown declined to buy the car from plaintiff, that the Dodge car was sold by plaintiff, and there is nothing in the record to show how much plaintiff received for it. From all that appears in the record, it may have been for its full value. As before stated, the order signed by Brown provides that it shall not be effective, and that the sale of the Dodge car would not be completed, until the sale was authorized by an officer of the plaintiff company, and the credit O.K'd. by a finance company. On the document received in evidence, among other things, is the following: "Authorized by E. E. Preston". A witness named Ernest Preston testified for plaintiff to the effect that he was an automobile dealer; that the Dodge coupe mentioned in the order was sold by the plaintiff, and that he did not know the price at which it was sold, nor to whom it was sold. It certainly cannot be said that this testimony identifies the person who signed the authorization of the order as an officer of the plaintiff company.

In The Estate Stove Co. v. Kenney, et al., 234 Ill. App. 366, an action was brought in the circuit court of Iroquois County to recover the price of stoves alleged to have been sold by the Estate Stove Company to W. E. Kenney and Oscar E. Danielson. The judgment there was for the appellees. The order for these stoves given by the defendant in that case, contains an agreement to the effect that "All agreements contained in this order * * * are subject to approval by a duly authorized executive officer of the company." The order was not approved by an executive officer of the company. The goods were shipped, and upon arrival, the defendants refused to

receive them, and in that case, the court made the following holding:

> "When appellees delivered the written order to the traveling salesman of appellant, that order was not a contract between the parties. It was merely an offer by appellees to purchase the stoves. Before it became a contract it had to be accepted by a duly authorized executive officer of appellant. Bay State Milling Co. v. Barth, 135 Ill. App. 539; Bent v. Jones, 172 Ill. App. 62. If a duly authorized executive officer of appellant did not see fit to accept the order, then it did not ripen into a contract and appellant was under no obligation to deliver the goods. E. C. Atkins & Co. v. Kirk, 187 Ill. App. 311. Where an offer is silent as to the time within which it is to be accepted, it must be accepted within a reasonable time after the offer is made. Larmon v. Jordan, 56 Ill. 204; Koeffler v. Davidson, 86 Ill. App. 542; Allen B. Wrisley Co. v. Mathieson Alkali Works, 107 Ill. App. 379; Benjamin on Sales (3rd Ed.) p. 61. If an offer is not accepted within a reasonable time the person making the offer has the right to presume that it is rejected. McGivern v. Parkhill, 195 Ill. App. 344. There is no evidence that this order was ever approved by a duly authorized executive officer of appellant. There is some evidence tending to show that it was approved by D. F. Kahn, but there is no evidence that he was a duly authorized executive officer of appellant. The evidence shows that the supposed approval was made by drawing a line across the order indicating that it had been accepted by appellant, but there is no evidence even tending to show who drew the line across the order, or when it was drawn."

Murray does not deny the statement of Brown that the price of $768.86 to be paid for the Dodge car was changed by Murray, and the price increased to $776.69, after the order was signed, and that when Brown's attention was called to this fact he declined to accept the car at the increased price. Plaintiff's right to recover is based entirely upon the theory that there was an offer by Brown and an acceptance by plaintiff, and that the assignment of the certificate of ownership of the DeSoto, conveyed title to the car to the plaintiff.

In El Reno Grocery Co. v. Stocking, 293 Ill. 494, the grocery company brought suit against the defendant to recover damages for an alleged breach by defendant of a contract for the purchase of certain canned corn. The action in that case was based upon a written offer made by the defendant to purchase the corn and an acceptance by the plaintiff. The offer provided that the shipment

should be made by a certain date. The date of shipment was changed by plaintiff, and in holding, that because of that fact, the plaintiff could not recover, the Supreme Court said:

> "In order to have the acceptance of an offer binding such acceptance must conform exactly to the offer, and if it contains new conditions there is no contract. Scott v. Fowler, 227 Ill. 104; Davis v. Fidelity Fire Ins. Co., 208 id. 375." (Italics ours)

In view of all the facts and circumstances in this case, we conclude that the assignment of the certificate of title to the plaintiff here by Brown conveyed no title, in the DeSoto car, to the plaintiff. It was made without any consideration, whatever. Therefore, the judgment of the Municipal Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND MEMEL, J. CONCUR.

38835

29

HEDWIG KRISTENSEN, (Plaintiff) Appellee, v. ANTONI BALCZENIUK, et al., On Appeal of ANTONI BALCZENIUK, and RACHELA BALCZENIUK, his wife, (Defendants) Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY. 259 I. A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of sale entered in a foreclosure proceeding, brought by Hedwig Kristensen, in the Circuit Court of Cook County on January 17th, 1936. The decree waseentered on the report of a Master, to which no objections or exceptions were taken. After certain formal findings as to the appearances of the parties, the decree appealed from, which recites all the material facts as found by the court, proceeds substantially as follows:

> "And this cause having been brought on to be heard upon the Amended Complaint taken as confessed by Antoni Balczeniuk and Rachela Balczeniuk, his wife, and John T. Murray, Successor in Trust. And on the answers of the defendants, August Wolter and A. Lapinski, and upon the plaintiff's replications to said answers, and upon the proofs and exhibits herein, and the Report of Benjamin S. Adamowski, a Master in Chancery of this Court, made in pursuance of an order of reference heretofore entered herein, and it appearing that all the parties are properly before the Court, and that the Court has jurisdiction of the subject matter, and of the parties hereto, it is ordered and adjudged by the Court that said report be and the same is hereby approved and confirmed, no objections or exceptions having been filed thereto."

The master found, as stated by the court in its decree:

> "That on August 25, 1923, Theodor Kollner and Henrietta Kollner, his wife, were indebted in the sum of $8,500. That in order to evidence their said indebtedness and to secure the payment thereof the said Theodor Kollner and Henrietta Kollner, made, executed and delivered their three principal promissory notes, designated 'A', 'B', and 'C', Note 'A' for $1,000.00, Note 'B' for $1,500.00, and Note 'C' for $6,000.00, all said notes payable to the order of themselves, bearing date, August 25, 1923, payable five years after date, with interest at 6% per annum, payable semi-annually, which said interest was evidenced by interest notes or coupons attached to each of said principal notes, ten for $30.00 each, 10 for $45.00 each, and 10 for $180.00 each. All said notes were

secured to be paid by a Trust Deed that was recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Doc. #8109493. That when said principal notes became due August 25, 1928, payment thereof was extended by agreement of the owners of the real estate described in said Trust Deed and the owners of said notes, and by subsequent extension agreements each of said principal notes was extended to become due and payable August 25, 1936. That the defendants, August Molter and A. Lapinski, have filed their answers herein submitting to the jurisdiction of this court and asking that the Notes 'A' and 'B' owned by them respectively, be foreclosed herein and that the amount due on said notes to said defendants be ascertained by the court in this proceeding. That all interest notes pertaining to Notes 'A', 'B' and 'C' that became due and payable prior to February 25, 1934, were paid when due, were so marked and delivered up. That the interest due and payable on each of said Notes 'A', 'B' and 'C' on February 25, 1934, was not paid and said interest notes and all subsequent interest notes pertaining to said notes 'A', 'B' and 'C' remain unpaid and in the hands and possession of the plaintiff as to those interest notes pertaining to Note 'C', in the hands of August Molter those pertaining to Note 'A', and in the hands of A. Lapinski those pertaining to Note 'B'.

"That the plaintiff, Hedwig Kristensen, and the defendants, August Molter and A. Lapinski, have and are entitled to equal and coordinate liens on the real estate described in the Amended Complaint by virtue of the lien of the Trust Deed foreclosed herein which was recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Doc. #8109493.

"And the court being fully advised in the premises, doth find that all the material allegations in said Amended Complaint are true and are proved. That there is due to the plaintiff, Hedwig Kristensen, as the owner of Note 'C', the sum of $6,930.74, and interest thereon at the lawful rate from the 3rd day of January, 1936, the date of said Master's Report. Also the sum of $700.00, also found due by said report as a reasonable attorney's fee, and the further sum of $11.00 for a reasonable stenographic fee under the provisions of the instruments sued on.

"That there is due the defendant, August Molter, as the owner of Note 'A', the sum of $1,155.13, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936.

"That there is due the defendant, A. Lapinski, as the owner of Note 'B', the sum of $1,732.70, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936."

Based upon the Master's report, the decree then proceeds as follows:

"It is, therefore, ordered, adjudged and decreed that if the defendants, Antoni Balczeniuk and Rachela Balczeniuk, his wife, or some of the defendants, do not pay within three days from this date, to the plaintiff, Hedwig Kristensen, as the owner of Note 'C', the sum of $6,930.74, with interest thereon at the lawful rate from January 3rd, 1936, until paid, and the costs of this suit, (including the said attorney's fees, stenographer's fees, and the Master's fees on the reference

herein, which are hereby taxed at the sum of $101.65, and to the defendant August Molter, as the owner of Note 'A', the sum of $1,155.13, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936, and to the defendant A. Lapinski, as the owner of Note 'B', the sum of $1,732.70, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936, the premises described in said Amended Complaint and the Master's Report, [description of the real estate involved] situated in the City of Chicago, County of Cook and State of Illinois, (together with all buildings and improvements thereon, and tenements, hereditaments and appurtenances thereto belonging), or so much thereof as may be sufficient to realize the amount due the plaintiff, Hedwig Kristensen, principal and interest and also the costs of this suit, including attorney's fees and other fees as aforesaid, disbursements and commissions, and the defendants, August Molter and A. Lapinski, principal and interest, and which may be sold separately without material injury to the parties interested, be sold at public auction, for cash, to the highest and best bidder, at the judicial salesrooms of the Board of Appeals, Room 337 County Building, in the City of Chicago, County of Cook and State of Illinois. [Then follows the order for publication of notice of the sale]

"Out of the proceeds of sale he shall retain his fees, disbursements and commissions, and see that all unpaid costs are paid to the persons entitled to receive the same. He shall then pay to the plaintiff, Hedwig Kristensen, and the defendants, August Molter and A. Lapinski, or to their respective attorneys of record, the amount due them respectively under this decree, with interest as aforesaid, and all taxable costs advanced by said parties, if the remainder of proceeds be sufficient; if not sufficient, he shall apply such remainder in satisfaction of said amounts due, as far as it will reach, paying to each of said parties her or his proportionate share of such remainder, and report the deficiency remaining unpaid to each. If there be no surplus he shall bring it into court to abide an further order herein.

"It is further decreed herein that in case of a deficiency of proceeds from said sale the Receiver heretofore appointed herein shall continue as Receiver until the further order of this court.

"After the coming in and confirmation of the Master's Report of sale, in case any deficiency is shown in the amount due the plaintiff and the defendants, August Molter and A. Lapinski, they shall be entitled to execution against the defendants, Antoni Balczeniuk and Rachela Balczeniuk, his wife, who are personally liable therefor." (Then follows a recitation to the effect that if the property being foreclosed is not redeemed, a deed shall issue.)

It is not claimed by defendants but that, by the terms of the trust deed and the extension agreement, defendants are in default on all the notes, and that the owners of the notes, therefore, have the right to foreclose. Defendants' contention is that the plaintiff in the bill of complaint is without authority to accelerate the

majority of the entire mortgage indebtedness upon default in the payment of the interest of the note held by her, and to foreclose such entire amount when other notes secured by the trust deed are owned by other persons, not complainants in the original bill. From the report of the Master and the decree of the court, it appears very clearly that the owners of the three notes for which the property sought to be foreclosed was pledged as security, by various pleadings, became parties to the foreclosure suit. We are of the opinion that that proceeding adopted by the court was in strict conformity with Sections 151, 152 and 153 of Chapter 110, Illinois State Bar Stats. 1935, which provide that all proper parties, plaintiff and defendant, may be brought into a proceeding. As a result of the procedure in this case, the entire subject matter was properly before, and all the parties were, within the jurisdiction of the court. The report of the Master finds as does the decree of the court, that the defendants were in default. In view of the fact that no objections or exceptions were taken to the Master's Report, we must proceed upon the theory that such report is conclusive of all questions covered by it.

In Cheltenham Improvement Co. v. Whitehead, 138 Ill. 379, the Supreme Court said:

> "The cause was referred to the master in chancery to take the proofs and report to the court. The evidence was taken and a report filed, but no exception was taken to the report of the master in regard to tax liens and payment of tax liens, either before the master or in the circuit court. If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent or insufficient to establish the claim he was required to file exceptions before the master, and, if overruled there, renew the exceptions in the circuit court. Had this course been pursued, the objection now relied upon might properly be considered; but as no exception was taken before the master, or in the circuit court, plaintiff in error is precluded from making the objection here. The master's report must be held conclusive of all questions covered by it not excepted to. Pennell v. Lamar Ins. Co., 73 Ill. 303."

We are of the opinion that the contentions of the defenddants are without merit, and the decree of the Circuit Court is, therefore, affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38846

30

ANNA SCHNEIDER, Appellee, v. SAMUEL MEYER and JULIA MEYER, Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

289 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered judgment against defendants in the Circuit Court of Cook County for the sum of $8,560.00. The action is based upon a principal and a series of interest notes executed by the defendants, and payable to plaintiff, all of which, the pleadings admit, were past due and unpaid. The notes were secured by a mortgage on real estate.

In the answer filed by defendants, it is alleged that on March 5th, 1935, plaintiff agreed with the defendants that the real estate mentioned should be sold for the best price obtainable, and that the proceeds of any such sale should be given to plaintiff for and in complete payment and satisfaction of the notes sued on, and further, that in the event said property could not be sold, that defendants would convey to plaintiff, or to any grantee she might direct, all their right, title and interest in and to the property described, and that in consideration for such conveyance, plaintiff agreed to cancel, satisfy and extinguish the notes sued upon; that immediately after such agreement was entered into, plaintiff and defendants, at plaintiff's request, proceeded to and did list the property for sale, but that plaintiff and defendants were unable to secure a satisfactory purchaser; that defendants offered, and still are ready, able and willing to carry out the aforesaid agreement, and have always been ready, able and willing, in accordance with the agreement, to convey the real estate by deed to plaintiff, or to any grantee that plaintiff might direct, in full and complete satisfaction of the notes sued upon, but that plaintiff, in violation of her agreement, has failed and refused to direct the defendants to

execute a deed, or accept the deed in accordance with said agreement, and refused to cancel, surrender and void the notes sued upon in violation of her agreement. In Conclusion, defendants state that, because of such agreement, they are not indebted to the plaintiff. Upon motion of plaintiff, the answer was stricken, and the judgment hereinbefore mentioned, was entered.

As near as we can determine from the statement of the case, which is extremely vague, defendants' position is that the facts set forth in the answer amounted to an accord and satisfaction. We call attention to the fact that there is no statement in this answer, to the effect that a deed to the property was ever tendered to the plaintiff. Even though all the matters set forth in the answer are true still the agreement by plaintiff to do the things alleged, does not amount to an accord and satisfaction.

In Simmons v. Clark, 56 Ill. 96, the Supreme Court said:

> "This is the case, then, of a promise without execution; and without an express agreement that the promise itself should be a satisfaction; in such case there is no satisfaction of the original debt. The distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance. Cumber v. Wane, Smith's Lead. Cas. 146. A mere agreement, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, and the giving of a negotiable promissory note of the debtor, for the smaller sum, on account of, and not in satisfaction of the prior debt, will make no difference. Id. 259, top paging, and see cases there cited.
>
> Where an accord is relied on, it must be executed; readiness to perform is not sufficient, nor is part performance sufficient; an accord is always to be entirely executed and not executory in any part. 2 Parsons on Cont. 193; Russell v. Lytle, 6 Wend. 390; Hawley v. Foote, 19 id. 516."

We are of the opinion that the defense set up by the answer is without merit, and that the court properly entered the order striking the answer and in entering judgment. The judgment is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38860

31

ARAM KASPAR, (Plaintiff) Appellant, v. ABSALOM ESHOO, also known as ABSALOM ESHOO DANIEL, (Defendant) Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On February 27th, 1935, judgment for $2,398.50 was entered by confession in the Municipal Court of Chicago on a judgment note given by defendant to plaintiff. On March 28th, 1935, a petition supported by affidavit, was made by defendant to vacate and set aside the judgment, to which petition an amendment was filed on March 28th, 1935. In the amended petition it is stated that Absalom Eshoo, also known as Absalom Eshoo Daniel, the maker of the note, had a good defense to the action upon its merits; that on March 31st, 1930, he borrowed the sum of $1,730.35 from the plaintiff, and as evidence of the indebtedness, executed the note in question, due and payable one year after its date, with interest at the rate of six per cent per annum; that subsequently plaintiff became indebted to the defendant in excess of the face value of the note, together with any accrued interest thereon, and entered into an agreement with defendant that the indebtedness shown to be due plaintiff by the note was paid and fully satisfied by an agreement entered into between the parties; that at the time of the execution of this agreement, defendant requested the return of the note from the plaintiff, and was informed by plaintiff that the note had been destroyed or lost. The agreement referred to, entered into between the parties on March 3rd, 1933, was offered and received in evidence, and is as follows:

"This Agreement Witnesseth: That the partnership heretofore existing between Aram Kaspar, Sahak Kember and Absalom Eshoo be and the same is hereby dissolved by mutual agreement.

"It is further agreed that an accounting has been had between all the parties and that there is no money due from any one of these parties to any one or more of the others.

"It is further agreed that all accounts of receipts and expenditures, of profits and losses, between the parties hereto, as such partners and individually have been heretofore fully accounted for and settled, and all of the parties hereto hereby declare that they do by this instrument hereby release each other from all claims of every kind and character arising out of the said partnership, or individually, that they or either of them have had against each other from the beginning of the world until now: It being agreed that this instrument shall be and is a full and complete release by each of said parties to the other parties hereto and each and every one of them.

"Witness our hands and seals at Chicago, Illinois, this 3rd day of March, A. D., 1933.

Aram Kaspar (Seal)
Sahak Kambar (Seal)
Absalom Eshoo, (Seal)"

Upon the filing of this petition, an order was entered by the court on April 3rd, 1935, directing that the judgment be opened and that defendant be given leave to appear and defend, that the judgment stand as security, and that execution be stayed until the further order of the court. After a hearing, judgment was entered against plaintiff for costs. From this judgment, this appeal is being prosecuted.

Defendant testified to the effect that the parties to the agreement had a "building partnership" in a building located at 1831 Balmoral avenue, in the City of Chicago. Although defendant's testimony as to the relations between himself, plaintiff and Kambar, is somewhat confusing, we conclude from it that the parties to this agreement owned the building referred to, as partners. He testified that at the time he and the others, entered into the partnership, defendant executed the note in question, and that at that time there were two mortgages on the premises; that defendant made payments on a second mortgage on the property at the rate of $50.00 per month, and that the first mortgage amounted to $5,500.00; that after defendant had made payments on the second mortgage for three years, the partners concluded that they could not carry the property any longer and decided to give it up, and that they then deeded it to the first mortgagee, and that they then decided that they would

regard the whole matter at an end. He testified that it was at this time the agreement referred to was entered into. Defendant further testified that "we", presumably meaning the three partners, made a deed to the first mortgagee for a consideration of $600.00, paid to the partners, which sum was split between them in equal parts. He also testified that when the partnership was entered into, Kamber put up $500.00, plaintiff $1,000.00, and that defendant gave the note upon which this action is predicated.

Kamber, the other partner, testified on behalf of plaintiff to the effect that the three partners purchased the real estate hereinbefore referred to for $15,500.00, and operated the building together until 1933, when he signed the agreement entered into between the three parties on the date shown by the instrument, and that he received no consideration from defendant at the time the document was signed. This witness also testified that he made certain payments on the second mortgage indebtedness.

Kaspar, the plaintiff, testified that there never was an accounting between the parties; that defendant never asked for his note, and that he never told the defendant the note was lost.

Plaintiff insists that his signature to the agreement was obtained by fraud, and, therefore, is not binding. The record indicates that all the parties to this transaction were literate, that they could each read and write English and no evidence was produced to indicate that the signature of either was obtained by fraud. Except for plaintiff's statement, there is nothing to show that each had not made a full accounting with the others. The contract itself indicates that this is true. From the language of the agreement, it appears that it was to amount to a full settlement of any and all the then pending matters between the parties, and a full release of any claim which each might have against the other.

The judgment is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38869

32

THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO, a corporation, Appellee, v. KASPAR AMERICAN STATE BANK, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY. 209 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the National Bank of the Republic of Chicago, a corporation, against the Kaspar American State Bank, for the sum of $3,660.90, entered on December 12th, 1935. The trial was before a jury, which returned a verdict for the amount of the judgment appealed from.

The action is based upon the charge that the defendant bank received from the plaintiff bank and the Standard Trust & Savings Bank the proceeds of a series of forged checks, - 142 in number. Sixty of the checks were drawn against the Standard Trust & Savings Bank, and eighty-two against the plaintiff bank. The checks drawn against the Standard Trust & Savings Bank were of various dates between July 1st, 1927, and December 31st, 1927, and those drawn against the plaintiff bank were of various dates between January 1st, 1928, and June 1st, 1928. It is not disputed but that the proceeds of these checks were paid to the defendant bank. On January 2nd, 1928, the Standard Trust & Savings Bank consolidated with the plaintiff bank, and assigned, transferred and conveyed to the plaintiff bank all right, title and interest in and to the sums of money claimed to be owed by reason of the aforesaid matters, and the right of action to recover upon the checks. The checks were all payroll checks of the Burton-Dixie Corporation, and were drawn by an employee of that corporation. It is claimed that the endorsement of the name of a payee upon each of these checks was forged thereon by one Stanley Stenkovitch, the foreman of the Burton-Dixie Corporation. The

evidence as to the forged endorsements on the checks is substantially as follows: The employees to whom these checks were issued and whose names it is charged were forged thereon, were eighteen in number. Five of the eighteen payees of the checks, testified that the endorsements on these checks, were not theirs, and that they had not authorized anyone to endorse their names thereon. This testimony involved thirty-seven of the checks. It is in evidence that every reasonable effort was made to locate the payee of the remaining checks, but that they could not be found.

Arch H. Hafferkamp, employed by the Burton-Dixie Corporation as an accountant, was shown what was purported to be the genuine signature of Stanley Stenkovitch. He testified that the documents submitted to him were in the handwriting of Stenkovitch. This witness also identified the signature of Ira B. Spackey, Auditor of the Burton-Dixie Corporation, and the signer of the checks, as the genuine signature of Spackey. He also testified that he was in charge of the issuance of all payroll checks during all the time involved here. Exhibits containing the genuine signature of Stenkovitch were offered and received in evidence. After examining the handwriting of Stenkovitch and the endorsements on the backs of all the checks, alleged to have been forgeries, Hafferkamp testified that the handwriting of these endorsements was the same as the handwriting on the documents containing what the record indicates is admitted to be the genuine signature and handwriting of Stenkovitch. Hafferkamp further testified that all the payroll checks issued by the Burton-Dixie Corporation at the end of each week by the accounting department of this institution were given to Stenkovitch for distribution among the employees in the various departments. A handwriting expert also testified that the endorsements on the checks were made by Stenkovitch.

It is in evidence, and not disputed, that in addition to the endorsement of the payee on each of these checks, each of them

was endorsed by one Mike Zupan; that the checks were then deposited with the defendant bank, and that they were paid to the defendant bank through the Chicago clearing house. No effort was made, and no testimony was offered by defendants to refute the above evidence. The checks referred to were all offered and received in evidence.

Defendant insists that the judgment should be reversed for the reason that the defendant bank received no notice of the alleged forgeries, nor any demand for payment of the amount collected on these checks, until this proceeding was commenced on October 8th, 1932, and we find nothing in the record to indicate that this is not true.

In Continental National Bank of Chicago v. Metropolitan National Bank of Chicago, 107 Ill. App. 455, it appears that on February 7th, 1894, the First National Bank of St. Paul, drew and delivered a draft for $33.00 to one Harper, payable to his order, and directed to the Continental Bank of Chicago. Prior to February 9th, 1894, the draft was raised to $3,300.00, and was presented to the Continental Bank of Chicago for certification and acceptance. It was accepted, and $3,300.00 was charged upon its books to the First National Bank of St. Paul after the check had been certified. Thereafter, on or about February 9th, 1894, the check was deposited by Harper with the American Trust & Savings Bank of Chicago and credited to his account in good faith, so far as that bank was concerned, and Harper drew against his current credit account with the last bank, which credit account included the raised check. About February 10th, following, the American Trust & Savings Bank, after having credited the $3,300.00 to Harper's account, deposited the draft with the Metropolitan National Bank of Chicago, and this letter bank gave the American Trust & Savings Bank credit for the $3,300.00, and on the same day sent the draft through the clearing house, where on February 10th, it was paid by the Continental Bank of Chicago to the Metropolitan National Bank of Chicago. On November 29th, 1898,

the Continental Bank of Chicago made a demand on the Metropolitan National Bank of Chicago for the repayment of the draft, which demand was refused, and suit was begun by the Continental Bank of Chicago against the Metropolitan National Bank of Chicago on November 30th, 1898, to recover the difference between the amount for which the draft was originally drawn, and the amount to which it was raised, as for money paid through mistake by the Continental Bank of Chicago to the Metropolitan National Bank of Chicago. In holding that no recovery could be had, this court said:

> "We have before us the two questions: (1) Should appellant have notified appellee that the draft had been raised at once upon hearing of the fraud, instead of waiting nearly five years before notifying appellee? (2) Should appellant have returned or offered to return to appellee the raised check?
>
> In First National Bank v. Ricker, 71 Ill. 439, it is said:
>
> 'In very many of the cases where it has been held the drawee cannot recover back money inadvertently paid on a forged bill or check, that one element of defense was in not giving prompt notice to the payee or holder, the instrument was a forgery. The tendency of all modern decisions seems to be that, where there has been an unreasonable delay in discovering the forgery and giving notice, it will in every instance bar a recovery by the payor.'
>
> In that case notice that the check was a forgery was given within a few hours after payment was made. In Schroeder v. Harvey, 75 Ill. 638, the court say:
>
> 'In Simms v. Clarke, 11 Ill. 137, it was held by this court that in case of a counterfeit bill, the party receiving it must return it within a reasonable time after it is discovered to be spurious or he loses his recourse upon the person from whom he received it, and that what shall be considered a reasonable time must necessarily depend upon the situation of the parties and the facts and circumstances of the particular case.'
>
> The same principle is declared in Magee v. Carmack, 13 Ill. 289; Union National Bank v. Baldenwick, 45 Ill. 376. The rule laid down in this state is, that reasonable diligence is required in giving notice of forgery after its discovery.
>
> What is reasonable diligence in giving notice is usually a question of fact under the circumstances of each particular case. The books abound in cases where, under the particular facts, periods of omission to give notice from one week to six months were considered such negligence as to preclude recovery of money paid out on forged paper or raised drafts. The Bank of St. Albans v. F. & M. Bank, 10 Vt. 141; 3 Randolph on Com. Paper, sec. 1740, and authorities cited in a note.
>
> In the case at bar, appellant and appellee at the time of the transactions in question, were both well known banking houses in the city of Chicago. While ordinarily money paid on a raised draft by mistake may be recovered back, still if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. This doctrine is clear and is sustained by authority.

"Was the delay of appellant in notifying appellee of forgery unreasonable and did it result in injury or loss to appellee? In Leather Mfrs. Bank v. Morgan, 117 U. S. 96, Mr. Justice Harlan, speaking for the court, said:

'If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank is thereby prejudiced because it was prevented from taking steps by the arrest of the criminal, or by an attachment of his property or other form of proceeding to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did or to have adopted the checks paid by the bank and charged to him, cannot be made in this action to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. As the right to seek and compel restoration and payment from the person committing the forgeries, was in itself a valuable one, it is sufficient if it appears that the bank by reason of the negligence of the depositors, was prevented from promptly, and, it may be effectively, exercising it.'"

We have quoted quite extensively from the case of Continental National Bank v. Metropolitan National Bank of Chicago, supra, and the cases there cited, for the reason that the law applying to the instant case is there collected, and is directly in point. We are of the opinion that the delay for a period of four years in notifying the defendant bank of the forgeries, defeats plaintiff's right to recover. See also Schroeder v. Harvey, 75 Ill. 638; Magee v. Carmack, 13 Ill. 289; Union National Bank v. Muldenwick, 45 Ill. 376.

The judgment is reversed and judgment is entered here against plaintiff for costs.

REVERSED AND JUDGMENT ENTERED HERE FOR COSTS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38838

J. HARRY GREEN, (Plaintiff) Appellee, v. JAMES STEWART CORPORATION, a corporation, (Defendant) Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This was an action filed in the Municipal Court of Chicago to recover commissions alleged to be due the plaintiff under a contract of employment as an insurance broker. The cause was tried before a six man jury and resulted in a verdict and judgment for the plaintiff of $6,060.24, from which the defendant appeals.

The plaintiff is an insurance broker connected with the Chicago Branch of the Standard Accident Insurance Company, of Detroit, Michigan. The Chicago office is located at 175 West Jackson Boulevard. Plaintiff has office space with the Insurance Company and as compensation receives commissions on insurance business passing through his hands for this company.

In January, 1934, the defendant, James Stewart Corporation, contemplated submitting a bid to the United States Government for the construction of Lock 12, on the Mississippi River. On January 16, 1934, H. O. Onsted, vice president of the defendant company, telephoned the Chicago office of the Standard Accident Insurance Company, talked with Maurice J. Scheemaecker, Manager of its Bond Department, and inquired whether the Standard Accident Insurance Company could furnish a bond for the defendant in connection with the contemplated Mississippi River job. Mr. Scheemaecker told Onsted that he "would try to get somebody over there right away," and then "went back to the Broker's Department and looked around for somebody who was competent to handle it, and talked to Mr. Green."

A short time after, pursuant to this conversation with Scheemaecker, plaintiff presented himself at plaintiff's office and saw Mr. Onsted. They had never met before, and had never had any business or other dealings with each other. The plaintiff arrived at defendant's office and introduced himself to Onsted and stated he understood the defendant was in the market for a bond to bid on Lock 13 on the Mississippi River, to which Onsted replied in the affirmative, saying that he had called the Standard Accident Insurance Company, because it had bonded the defendant company in quite a large sum on a previous occasion. Plaintiff testified that upon introducing himself he gave Onsted a business card, which bore the legend, "J. Harry Green & Co., Insurance Brokers, 175 West Jackson Boulevard, Chicago" with "J. Harry Green" in the lower left-hand corner, and that he told Onsted that he was an insurance broker specializing in bid bonds, and understood contractor's problems, because he was "raised in the building business prior to becoming an insurance broker." Onsted testified that he did not recall plaintiff's handing him his card, though he might have done so, and testified further that plaintiff did not say anything to him about being an insurance and bond broker.

After some discussion regarding the nature of the proposed job, plaintiff left the defendant's office,discussed the matter with the officials of the Standard Accident Insurance Company, and called again at defendant's office the next day, at which time he and Onsted discussed the financial condition of the defendant corporation. Onsted produced the figures for plaintiff and at plaintiff's request that evening prepared and mailed a financial statement to the home office of the Standard Accident Insurance Company, at Detroit, Michigan. A copy of this statement, defendant's Exhibit 1, was offered in evidence by defendant, but was excluded by the court.

Plaintiff testified that he asked that this information be sent to Detroit, so that Scheemaecker could take it up with the home

office, in the morning, and that was the extent of his first conversation concerning defendant's financial standing. After the plaintiff received word from the Standard Accident Insurance Company he went back to defendant's office and told Mr. Onsted that "we would have to bolster up their financial condition." He testified that in the course of this conversation, Onsted told him that defendant had an open line of credit at the Continental Bank for a sufficient amount of money to carry on the entire project; that plaintiff replied, "that was fine, as far as carrying on the project was concerned, but it didn't furnish the cash necessary to underwrite the bond and would not assist us in getting the necessary reinsurance which the companies have to have to execute a bond that size, and that he would have to have additional capital some place;" and that Onsted then said he could get $100,000 from the parent company in New York. Onsted testified plaintiff explained to him that it was customary on bonds of this kind to have liquid assets of approximately 15% of the contract; that defendant's liquid assets were short of the required amount by approximately $100,000; that plaintiff asked him where defendant would get additional money to carry on the work, if it required it, and that he told plaintiff he could arrange to borrow it. He further testified:

> "The time was growing short until we had to put in the bid and I had to leave the city so I told Mr. Green that if he was not able to get that bond, we would have to look elsewhere for it, that I would have to have my bidder's bond by Saturday, because I was leaving town to visit the site and complete the estimating and putting in the bid."

Shortly after January 20, 1934, the plaintiff arrived at defendant's office with a bid bond in his pocket in the penal sum of $150,000 executed by the Standard Accident Insurance Company, and a printed form of application, and a draft of a letter to be written by the defendant to the Standard Accident Insurance Company. The plaintiff testified that the application form had been filled in and prepared for defendant's signature by the Standard Accident Insurance

Company, and given to him to obtain its execution, and that this draft of the letter to be written to the Standard Accident Insurance Company by the defendant had been prepared under his direction in the office of the insurance company. The application as well as the letter to be written to the Insurance Company in the form indicated, was signed by Onsted, one of the officers of the defendant corporation, and thereupon the plaintiff delivered the executed bid bond to him. The letter which was to be written in the form desired by the Insurance Company followed the form delivered to the defendant, and is as follows:

"January 20th, 1934

Standard Accident Insurance Company
175 W. Jackson Boulevard
Chicago, Illinois

Gentlemen: -

RE: Construction of Lock Number 12,
Mississippi River, at Bellevue,
Iowa.

We attach an application for a bid Bond in connection with the above project.

Please execute this Bid Bond in the amount of $150,000.00, it being our understanding that at this time you have not secured the necessary reinsurance and/or co-surety to enable you to execute the final bond. In the event that we are the successful bidder for this contract you are not obligated to sign the final bond unless the necessary reinsurance or co-surety is secured, and we will render any assistance necessary to enable you to secure the necessary reinsurance or co-surety.

Yours very truly,
James Stewart Corporation
By H. G. Onsted
Vice President."

Immediately after this last conference between the defendant and Onsted, the latter went to Rock Island, Illinois to visit the site and put in a bid on the job. While the contract was not awarded at once, he was advised that defendant had made the low bid, of $1,346,720.00, and would be notified officially later, and returned to Chicago where he again saw plaintiff at defendant's office on the following Wednesday morning, January 24, 1934. Onsted told plaintiff that if he was going to get the permanent bond, he would have to hurry, because it would have to accompany the contract, which would have to be signed in ten days. Plaintiff said that he would bring the

manager of the Standard Accident Insurance Company over on the following morning. Plaintiff and Maurice J. Scheemaecker, of this Insurance Company called at the defendant's office and conferred with Onsted regarding the permanent bond. The conversation was principally between Scheemaecker and Onsted, although the plaintiff was present. The conversation was regarding the financial set-up of the defendant company, and at that time there was a discussion as to the best method of putting in $100,000 in the James Stewart Corporation.

It appears from this meeting that Scheemaecker pointed out that the money that was to be put into the corporation would either have to be contributed in the form of a contribution to surplus or additional capital stock or in the form of a loan with the lender subordinating its right to collect it until all the bills were paid, that is to say, that the $100,000 would stay there during the entire time that the contract bond was in force.

On the morning following this conversation, plaintiff again called at the defendant's office, and while he was there Onsted discussed this bond with A. M. Stewart in New York, over the long distance telephone.

Following Onsted's talk with Mr. Stewart of New York, he advised Mr. Green that Mr. Stewart would not agree to go on the bond as indemnity, which had been one of the requirements, and that if they were not able to furnish that bond, Mr. Stewart would have to arrange to get the bond. As a result, the bond was not furnished and the defendant company arranged for a bond elsewhere.

The plaintiff contends that the question of the plaintiff's right to recover upon a contract of employment is one of fact, and this fact having been determined in favor of the plaintiff by the verdict of the jury and the judgment of the court, it is sufficient to justify the affirmance of the judgment by this court. This is

manager of the [illegible]
following morning. [illegible]
Insurance Company [illegible]
with [illegible] regarding the [illegible]
principally between [illegible]
was present. The conversation [illegible]
of the defendant company, [illegible]
as to the best method [illegible]
Sutterlin.

It seems [illegible]
out that the money [illegible]
either have to be [illegible]
services or [illegible]
the lender [illegible]
were made, that is [illegible]
the entire time [illegible]

On the [illegible] following [illegible] conversation, plaintiff
again called at the defendant's office, [illegible]
Omitted [illegible] in [illegible]
the long distance telephone.

Following [illegible]
advised it, [illegible]
bond to indemnify, [illegible]
if they were not able to furnish the bond, [illegible]
to arrange to get the [illegible]
and the defendant company [illegible]

The plaintiff contends that the [illegible] plaintiff's
right to recover [illegible] contract [illegible]
this fact having been [illegible] in favor of the plaintiff by the
verdict of the jury and the judgment of the court, it is sufficient
to justify the affirmance of the judgment by this court. [illegible]

generally true when there is evidence before the jury to support the plaintiff's clain that a contract exists.

This court in order to determine if there is evidence of a contract will examine the record and endeavor to ascertain if there is any evidence to support plaintiff's claim of employment as a broker to negotiate for the defendant with the Insurance Company for an indemnity bond for the purpose desired by the defendant, and unless there is evidence of the existence of a contract, it is the duty of the court to reverse the judgment, notwithstanding the verdict of the jury.

It does not appear to be plaintiff's contention that he seeks to recover upon an express contract, but from what we gather from his argument there was an implied undertaking by the defendant to pay for plaintiff's services rendered as a broker in the negotiation for the issuance of the bond desired by the defendant. There is no evidence, as far as we have been able to find in the record, that the question of the employment of the defendant as a broker was discussed with the plaintiff.

In the instant case, the rule applicable to the question is stated in The People v. Dummer, 274 Ill. 637, as follows:

> "A contract is an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing. (2 Blackstone's Com. 442; 2 Kent's Com. 449; 1 Parsons on Contracts, sec. 1.) It may be express where the terms of the agreement are declared by the parties in writing or verbally at the time it is entered into, and, of course, there is no express promise by a property owner involved in a levy of taxes upon his property and none was claimed in this case. A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract is where one performs services for another under circumstances showing that they were not intended to be gratuitous and the services are accepted. * * * The only difference between an express contract and an implied contract in the proper sense is, that in the former the parties arrive at an agreement by words, either verbal or written, while in the latter the agreement is arrived at by a consideration of their acts and conduct. (2 Page on Contracts, sec. 771.)"

The evidence indicates that the plaintiff as an insurance broker had office space and telephone service, without expense to him, with the Chicago Office of the Standard Accident Insurance Company of Detroit, Michigan, located at 175 West Jackson Blvd; that he received commissions from this company for insurance business initiated by him and transacted by the company.

As to an express understanding regarding the transaction considered by the parties in the instant case, the record is silent. The question of an amount to be paid to plaintiff by the defendant was not discussed. The plaintiff seems to indicate from his acts that he was acting for the insurance company rather than for the defendant.

After the officer of the defendant company telephoned and talked with the manager of the insurance company, the manager directed the plaintiff to take up with the defendant the question of the furnishing of a bond by the insurance company. The plaintiff at that time was not acquainted with the defendant or its officers, and got in touch with the defendant only when he was directed by the manager of the insurance company to take up the question of a bond with the defendant.

The bond required was one that was to be furnished by the defendant upon the acceptance by the U. S. Government of its bid for the construction of Lock 12 on the Mississippi River.

The plaintiff lays special stress upon the fact that the defendant first consulted with one Parish, a bond broker, and was unable to obtain a bond through this broker for the purpose indicated in this opinion. Just what this had to do with the question here, is not clear. The plaintiff must recover, if at all, upon the evidence signifying employment, and not upon what Mr. Parish, the broker, did or did not do.

It would seem only reasonable that the plaintiff should have indicated that for his efforts in this regard he would accept

compensation from the defendant, irrespective of the success of the enterprise.

Plaintiff's evidence is clear that for insurance business turned over to the company with which he was connected he would receive 30% of the premium paid, and when he received a premium of $5.00 for the bid bond, so-called, from the defendant, he would deduct 30% of this amount and turn over the balance of $3.50 to the insurance company.

Plaintiff testified:

> "I sent the Stewart Company a bill for $5.00 (for the original bid bond). They paid me $5.00. I deducted 30 per cent and paid the company $3.50. On the other dealings with the other matters I discussed I said I would have billed the company for the premium that would be 1½ per cent of the total amount of the contract. I would bill them 100 per cent and pay the Standard Accident Company 70 per cent. I deal in surety bonds and not in merchandise. I buy them for seventy and sell them for one hundred. The difference is my brokerage."

As to the connection of the plaintiff with the insurance company, the manager, Mr. Scheemaecker, testified:

> "Mr. Green has no connection with the Standard Accident Insurance Company except as a broker. Green is in the same category as is all office brokers. We expect him to give us first choice of his business. If he doesn't we probably wouldn't permit him to use the space that he does. However, he has a right to take his business any place he should please."

As we have already stated, the evidence does not indicate that an agreement was entered into between the plaintiff and the defendant that the plaintiff should render services for the defendant in consideration of compensation to be paid by the defendant.

It would seem that plaintiff was a broker in the insurance company's office, and that this company expected the plaintiff to give the insurance company "first choice of his business. If he doesn't we probably wouldn't permit him to use the space that he does." This position of the company, no doubt, was predicated upon the fact that plaintiff was a broker in its office and was furnished space and the use of the telephone without charge, for which the company had first call upon his services. The defendant, of course, had no

knowledge of this business arrangement of the plaintiff with the insurance company, and that plaintiff was not altogether free to act for the defendant upon the question of the insurance it desired.

This court in the case of Voit Rubber Co. v. Peoria Coca Cola Bottling Co., 280 Ill. App. 14, upon the question of what must appear from the evidence in order to establish a contract between the parties, said:

> "A contract of sale, whether express or implied, must contain the essential elements of a contract - an offer and an acceptance of the offer. The offer must be communicated to the one who is to be the acceptor thereof, and its communication must be under such conditions that the one who receives it is aware that an offer to enter into a contract has been made to him. An implied contract in fact cannot be thrust upon a person by the courts without his consent. Unless it appears that his intention was to enter into contractual relation with another we cannot say that he has done so."

The rule in general is, and it needs no citation of authorities, that a person cannot act for both the company and the assured unless he does so with the consent of both parties. While it is true that where a broker obtains a policy for the assured, he shall be deemed to be the agent of the assured, still this may be overcome by the fact that the broker may have acted as the agent of the company in regard to the policy.

In Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545, the Supreme Court said:

> "Puschman was, at the time, an insurance broker or a street solicitor of insurance. He came to the plaintiff and represented that he was agent for the Lycoming Fire Insurance Company and the German Insurance Company of Freeport, and solicited the risk upon her property. * * *
> * * *If the plaintiff dealt with Puschman as the agent of the company, believing him to be such, and did not employ him to act for her as her broker in obtaining the insurance, he would have no power to act for or bind her. * * *.
> The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

And also in Newark Fire Ins. Co. v. Simmons, et al, 110 Ill. 166, the court said:

> "It is true that a clause in the policy declares that where a broker obtains the policy, as was the case here, he shall be deemed to be the agent of the assured in any transaction relating to the insurance; but a clause of this character can not overcome the fact that the brokers may have acted as agents of the company in some matter in connection with the policy, if such is the fact, as has been held by this court in Commercial Ins. Co. v. Ives, 56 Ill. 406, and Union Ins. Co. v. Chipp, 93 id. 100."

And again in Boston Store v. Hartford Accident & Indemnity Co., 227 Ill. App. 192, the court said:

> "Although ordinarily an insurance broker is considered the agent of the assured and not of the insurance company, sometimes the actions of the company and its dealings with the broker create the relation of principal and agent between the company and the broker. In 22 Cyc. 1427, it is said: 'A person may become authorized to bind the company as its agent not only by formal appointment as such agent, but also by being authorized by implication to act on behalf of the company in relation to its business, * * *. The authority of the agent is often sufficiently indicated by the general course of business in which he acts for the company, such course of business being known to the company and not objected to.'"

The plaintiff in this matter acted as the agent of the Standard Accident Insurance Company rather than that of the defendant. As we have indicated in this opinion, he was first employed and directed to act with reference to this matter by the manager of the Insurance Company, received his instruction from the manager, executed a bid bond for the insurance company, and procured and accepted the application and other documents for and on behalf of this company. It does not appear from the evidence that he ever received any instructions from the defendant, or that he was requested or employed to act for the defendant, or rendered any service whatever to the defendant, except for the insurance company, and upon these facts we believe that he has not established from the facts in evidence that the defendant entered into contractual relations with the plaintiff, for which he now seeks to recover commissions claimed to be due.

The fact is called to the attention of the court that even if plaintiff had been employed by the defendant as its broker, he still would not be entitled to collect commissions from the defendant, because it appears that the Standard Accident Insurance Company refused to issue the bond required, unless and until the defendant complied with the conditions laid down by it, and the defendant points to this fact: That Scheemaecker, the manager of the Standard Accident Insurance Company's Bond Department, testified that he told Onsted, in the plaintiff's presence, that defendant would not only have to raise $100,000 to be eligible for a Standard bond, but would have to raise it in a special and peculiar way, namely, by a "subordinated" loan or an addition to its capital stock, or, in the alternative, procure "indemnity" for the Standard from defendant's parent company. In the application for the bid bond, defendant stated that it had arranged a loan of $100,000 for the purpose of handling this contract, and that this sum was available as a loan when and as required for the job, which was not denied by the plaintiff. But it appears from the testimony of plaintiff's witnesses that the manner of providing working capital was not acceptable to the Standard Company, and that the company refused to write the bond unless the other and further conditions laid down by it were complied with. It is apparent that the insurance company was not ready, able and willing to furnish the bond as required by the defendant. Therefore, if we assume that the plaintiff was employed as defendant's broker, he could not recover compensation for commissions for the issuance of a bond which was not furnished or tendered to the defendant.

Other questions are raised by the defendant, but in view of our conclusion upon the question of the employment of the plaintiff, it will not be necessary to consider them.

Judgment for the plaintiff is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

39231

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. EDWARD STANTON, Plaintiff in Error.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.

33

239 I.A. 616 4

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By writ of error defendant seeks the reversal of a judgment of the Municipal Court of Chicago, entered on July 6th, 1936. In a trial before the court, without a jury, the court found that "the defendant is guilty of the criminal offense of maliciously shifting the starting device or gear of an automobile in the absence or without the consent of the owner thereof." Thereupon, defendant was sentenced to serve a term of nine months in the House of Correction and to pay a fine of $100.00.

The information filed in the cause is in words and figures as follows:

"State of Illinois)
County of Cook) SS.
City of Chicago)

IN THE
MUNICIPAL COURT OF CHICAGO

John Szafarczyk a resident of the City of Chicago in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the court to be informed and understand that Edward Stanton heretofore, to-wit: on the fourth day of July A. D. 1936, at the City of Chicago aforesaid did then and there unlawfully and intentionally, and without the authority from the owner, to start or cause to be started the motor of a motor vehicle, or to maliciously shift or change the starting device or gears of a standing motor vehicle to a position other than that in which it was left by the owner of the said motor vehicle, to-wit:

A 1936 Pontiac Sedan, Motor No. 6-157-196
In viol., of Par. 439 Chap. 38 S. & H. R. S. 1931

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

(X) John J. Szafarczyk
9543 Charles

State of Illinois)
County of Cook) ss.
City of Chicago)

(X) John J. Szafarczyk, being first duly sworn, on his oath, deposes and says that he resides at - - - - that he has read the foregoing information by - - - - - - subscribed and that the same is true.

(X) John J. Szafarczyk

Subscribed and sworn to before me this - - - day of - - A. D., 193- -,

(Signed) Richard Frohlich,
Clerk of the Municipal
Court of Chicago."

No report of the evidence taken in the proceeding in the Municipal Court of Chicago is in the record filed here. The act which defendant is charged with violating, described in the information as "Par. 439, Chap. 38, S. & H. R. S. 1931," is found in Par. 439, Chap. 38, Smith-Hurd Illinois Revised Statutes, 1931, and is as follows:

"An Act to make unlawful the damaging or unauthorized tampering or meddling with a motor vehicle or with the motor or other parts thereof, and providing a penalty therefor. (Approved June 27, 1917. L. 1917, P. 349.)

"Tampering with any motor vehicle. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That it shall be unlawful for any person, intentionally and without authority from the owner, to start or cause to be started the motor of any motor vehicle, or to maliciously shift or change the starting device or gears of a standing motor vehicle, to a position other than that in which it was left by the owner or driver of said motor vehicle; and it shall be unlawful to intentionally cut, mark, scratch or damage the chassis, running gear, body, sides, top, covering or upholstering of any motor vehicle, the property of another, or to intentionally cut, mash, mark, destroy or damage such motor vehicle, or any of the accessories, equipment, appurtenances or attachments thereof, or any spare or extra parts thereon being or thereto attached, without the permission of the owner thereof, or to intentionally release the brake upon any standing motor vehicle, with intent to injure said machine or cause the same to be removed without the consent of the owner, any person who shall violate any of the provisions of this act shall, upon conviction thereof, be confined in the county jail, or sentenced to labor in the workhouse of the county, city or town where the conviction is had, or on the streets or alleys of the city or on the public roads in the county, or to such labor under the direction of the sheriff, as the county board may provide for, not exceeding one (1) year, or fined not exceeding two hundred ($200) dollars, or both.

"The words 'motor vehicle' shall include automobile, locomobiles and all other vehicle propelled otherwise than by muscular power, except motor bicycles, traction engines and road rollers, the cars of electric and steam railways and other motor vehicles running only upon rails or tracks."

Defendant seeks the reversal of the judgment for the following reasons; that the information is void on its face; that the defendant was denied counsel, and that the judgment in itself is void.

We find nothing in the record to indicate whether or not motions were made in the trial court, to quash the information, for a new trial, or in arrest of judgment. Therefore, we will presume that no such motions were made.

In People v. Prystalski, 358 Ill. 198, the Supreme Court said:

> "No motion to quash the information nor in arrest of judgment was made by Hazel Renke. Where the court is by statute given jurisdiction of the subject matter of the offense, insufficiency of an information or indictment, when not raised by motion to quash or in arrest of judgment, is waived."

As to the question of whether or not the information is sufficient, we cite Chapter 38, paragraph 716, section 6, Smith-Hurd, Illinois Revised Statutes, 1931, which is as follows:

> "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury."

Counsel states that in the trial, defendant was deprived of the right of counsel. Except counsel's statement, there is nothing to indicate whether this is true or not. Prior to entering the judgment, in addition to its finding referred to, the court entered the following finding:

> "The people being now here represented by the State's Attorney and said defendant being present in his own proper person and not represented by counsel and the trial of this cause is now here entered upon before the court without a jury, and the court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:
>
> 'The court finds the defendant guilty in the manner and form as charged in the information herein, wherefore it is ordered that the same be entered of record herein.'"

whether the defendant requested the court to appoint counsel for him, or whether he went to trial voluntarily without being represented by counsel, also does not appear from the record.

In The People v. Parcora, 358 Ill. 448, the Supreme Court said:

> "The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a request for the services of counsel."

After reading the statute which defendant is charged with violating, together with the information, we conclude that the information, upon which the trial was had, sufficiently apprised the defendant of the charge against him, and that the other grounds urged for reversal are without merit. Therefore, the judgment of the Municipal Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

39231

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. EDWARD STANTON, Plaintiff in Error.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

In this case a rehearing was granted on petition of defendant. After considering the petition, it is the order of the court that the original opinion stand, and that the judgment of the Municipal Court of Chicago be affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38876

35

JOHN T. KAMEN and MINNIE F. KAMEN, for the use of PATRICK W. MURPHY, (Plaintiff) Appellee, v. CHICAGO COIL SPRING COMPANY, a corporation, (Garnishee) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 617

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal in this court is by the Chicago Coil Spring Company, a corporation, as garnishee, from a final order entered in a garnishment proceeding in the Municipal Court of Chicago, on January 22, 1936. Upon a hearing the judgment order found the issues against the garnishee and further found that there was due from the defendant as garnishee the sum of $150.00, and that the sum be had and recovered for the use of the plaintiff.

The original action upon which this garnishment proceeding was had was one in which Patrick W. Murphy was plaintiff and John T. Kamen and Minnie F. Kamen were defendants. In that suit the plaintiff claimed from the defendants the sum of $2,937.50, and accrued interest on five first mortgage gold bonds which had been executed by the defendants. Plaintiff alleged that he was the bearer of said bonds and entitled to the face value of the bonds, plus interest at the rate of seven per cent per annum.

Service was had on the defendants, who failed to appear, and a default judgment was entered against them on July 5, 1935, in the sum of $2,937.50. On August 30, 1935, a general execution was issued by the Clerk of the Municipal Court of Chicago. This execution was returned by the bailiff of the court with the endorsement thereon, "No part satisfied" on the day that the same was placed in his hands, August 30, 1935.

On November 19, 1935, a praecipe and statement of claim for garnishment was filed by the plaintiff in the Municipal Court of Chicago. On the same day the clerk issued a garnishment summons which was served on Chicago Coil Spring Company, returnable November 26, 1935. This garnishee defendant filed an answer on December 13, 1935, to the interrogatories propounded to it by Patrick M. Murphy.

Thereafter a hearing was had before the court, and on January 22, 1936, the court in the garnishment proceeding found in favor of the plaintiff, and entered judgment against the garnishee defendant, and it is from this order that the appeal was taken.

One of the errors assigned by the garnishee is that the judgment against the garnishee was erroneous because the bailiff returned the execution endorsed thereon, "No Part Satisfied" immediately after the same was issued, although the plaintiff knew that certain real estate was owned by the defendant in the original action out of which he could have satisfied his judgment.

The garnishment action against the garnishee is a statutory proceeding, and it is necessary before the process of garnishment on a judgment can legally issue that there shall be a return of the execution issued on the judgment "No Property Found." In this case the record shows that the return of the execution in the hands of the bailiff was endorsed, "No Part Satisfied". Sec. 1 Ch. 62, of the Garnishment Act, Ill. St. Bar Stats. 1935, is in these words:

> "Whenever a judgment shall be rendered by any court of record, or any justice of the peace in this State, and an execution against the defendant or defendants in such judgment shall be returned by the proper officer 'No Property found', on the affidavit of the plaintiff, or other credible person, being filed with the clerk of such court or justice of the peace, that said defendant or defendants has or have no property within the knowledge of such affiant, in his or their possession, liable to execution, and that such affiant hath just reason to believe that any other person is indebted to such defendant, or defendants, or to either or any of such defendants, or hath any effects or estate of such defendant, or defendants or of either or any of such defendants, in his possession custody or charge, it shall be lawful for such clerk or justice of the peace to issue a summons against the person supposed to be indebted to, or supposed to have any of the effects or estate of the said defendant, or defendants,

or of either or any of such defendants, commanding him to appear before said court or justice, as a garnishee; and said court or justice of the peace shall examine and proceed against such garnishee or garnishees, in the same manner as is required by law against garnishees in original attachments."

From this provision of the Garnishment Act it is clear that the return on the execution did not comply with the provision of the statute that the execution be returned by the officer, "No property found". On the contrary, the return on the execution was, "No Part Satisfied."

In the case of Farnum v. North Chicago Safety Deposit Vault Co., 97 Ill. App. 439, a proceeding of this character, this court said:

> "'The proceeding is statutory and can not be extended beyond the plain provisions of the statute.' Ill. C. R. R. Co. v. Weaver, 54 Ill. 319; Webster v. Steele, 75 Ill. 544, 546; Bartell v. Bauman, 12 Ill. App. 450; Netter v. Board of Trade, etc., 12 Ill. App. 607; Drake on Attachments, 5th ed., 451a.
>
> By the statute quoted (Sec. 1, Ch. 62 of the Garnishment Act) it is clearly necessary that before process of garnishment on a judgment can legally issue there shall be a return of the execution issued on the judgment 'no property found'. In the present case the return on the execution, as shown by the record, is, 'No part satisfied', May 26th, 1896.' This return may be, and doubtless is true, and yet the defendant in the execution may have had property more than sufficient to satisfy it. Clearly, it is not such a return as the statute prescribes, and is insufficient to warrant a judgment against appellant.
>
> The Supreme Court has recognized that in garnishment against stockholders on a judgment against a corporation, the execution against the corporation must be returned 'no property found.' Coalfield Co. v. Peck, 98 Ill. 139, 142."

This opinion from which this court quotes was approved by the Appellate Court in the case of Antonio Mennella v. Michael Bottiglieri 191 Ill. App. 574. See also Chicago Title & Trust Co. v. La Porte Bldg. Corp. for use of Walter Boland, Plaintiff in Error, and The First National Bank of Chicago, Garnishee, 274 Ill. App. 335.

For the reason that a return was not endorsed on the execution by the bailiff in accordance with the provisions of the

statute, the court erred in entering judgment against the garnishee.

Other questions have been raised, but in view of our conclusions as stated, it will not be necessary to consider them.

The judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

38889

36

JOSEPHINE SLANSEK, Appellee, v. SLOVENSKA NARODNA PODPORNA JEDNOTA, (Slovene National Benefit Society), an Illinois Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO. 289 I.A. 617

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment entered by the court for the plaintiff in the sum of $300. The action is a fourth class one, instituted in the Municipal Court of Chicago by the plaintiff to recover a death benefit alleged to be due her as the beneficiary named in defendant's certificate of membership issued by it to Frank Slansek, the late husband of the plaintiff. The suit is based upon the amount due from the defendant upon the death of Frank Slansek, as a passive member.

Upon the hearing the parties waived a jury and the cause was submitted to the court, and judgment was entered for the amount from which this appeal is taken.

The question before this court is whether the defendant society had the lawful right by its charter, by-laws and certificate issued to Frank Slansek and made payable to the plaintiff as beneficiary, to pay to the undertaker the amount due for services rendered, but not to exceed the sum of $350, and deduct such amount from the amount due the beneficiary under the terms of the certificate of membership.

The charter was issued on June 17, 1907, under an act providing for such organization, and its certificate of incorporation provides:

> "4. The object for which this corporation is formed is to unite eligible persons of Slovene nationality and of sound mind, health and good moral character for their social, intellectual and moral welfare, and to provide death, funeral, sick ancident and disability benefits for

its members, which said benefits are to be paid from assessments to be levied and collected from its members as provided for in the by-laws of said society."

One of the by-laws of the defendant society provides for what is termed a passive member, and is in part as follows:

"Sec. 4. Members unable to pay their assessments on account of a strike or suspension of employment, may become passive members. Any such member shall notify the Branch secretary of his intention to become a passive member in advance, and his passive membership shall begin with the following month, providing, however, that passive membership on account of a strike or out of work shall be allowed to the members residing in the immediate neighborhood only, and no suspicion has arisen as to the abuse of the privileges granted by this Section. * * * The Society shall pay not more than $250.00 death benefit for any passive member; in case he was insured for less than $250.00, then only such amount shall be paid."

Article 27, Sec. 1 of the by-laws, which refers to the payment of funeral expenses, is as follows:

"Sec. 1. Upon the death of any member in good standing, as provided by the By-Laws, the Society shall pay from his death benefit a sum not less than $5.00 and not to exceed $250.00 for the funeral expenses. In no case shall more than the amount of the death benefit be paid. The secretary of the subordinate Branch shall file with the Supreme Secretary the death certificate, together with the undertaker's bill sworn to before a notary public, before payment of said sum shall be made."

Section 2 provides:

"Sec. 2. Every local Branch shall arrange the funeral of its own member and bear its expenses. In case a member dies in the vicinity of another Branch, which is nearer than his own Branch, then such a Branch shall arrange the funeral and provide the necessary things, if the funeral is conducted with the S.N.P.J. rites, but the expenses of such Branch shall be paid by the Branch in which the deceased held his membership."

Plaintiff's husband in his lifetime was a member of the defendant society for many years prior to his death. The certificate issued to him by the Supreme Lodge of the defendant order provides the terms and conditions of Frank Slansek's membership. It is also subject, among other provisions, to any changes, additions or amendments to said charter or by-laws enacted subsequent to the issuance of the certificate of membership, and such by-laws shall control and be binding not alone upon the member but also upon the plaintiff

beneficiary. This certificate also provides that -

"A sum not less than $5.00 and not to exceed $250.00 can be paid for his or her funeral expenses and deducted from the full amount."

The defendant society, notwithstanding the beneficiary's arrangement with the undertaker that the expense of the funeral should be $150, and the receipt of a letter from the plaintiff stating that she desired to have the money paid direct to her, paid the sum of $220.50 direct to the undertaker who, it is claimed, performed the services in preparing the body for burial, and thereafter mailed the balance of the amount allowed for such funeral expenses to the plaintiff by enclosing a check for $29.50, which she refused to accept and returned to the defendant society.

The plaintiff takes the position that the defendant society has no further or other power than that granted by the State, and that under the provisions of Ch. 73, Par. 488, Sec. 1, Ill. State Bar Stats. 1935, which is in part as follows:

> "Section 1. A fraternal beneficiary society is hereby declared to be a corporation, society or association formed, organized or carried on for the sole benefit of its members and their beneficiaries, and not for profit. The payment of death benefits shall only be paid to the families, heirs, blood relations, ascending or descending wife, husband, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-children, step-brother, step-sister, children by legal adoption, parents by legal adoption, affianced wife, or affianced husband of the member, a person or persons upon whom the member is dependent, a person or persons dependent upon the member, or to a trustee for the sole benefit of any person or persons within the above classes. Within the above restrictions each member shall have the right to designate his or her beneficiary or beneficiaries, and, from time to time have the same changed in accordance with the laws, rules and regulations of the society. * * *"

it is not provided that the defendant society has authority to direct that a fund be paid to the undertaker for services such as were rendered in the burial of plaintiff's late husband; that such provision does not come within the classes specified in the statute which are to be benefited; nor can the defendant society designate

a beneficiary other than provided for by law, and if the statute under which a corporation is organized and its charter issued in pursuance of such statute, designates that the beneficiaries and members are confined to certain classes, the designation of one not of such class is void.

The contract between a benefit society and its members is contained in the certificate taken in connection with the constitution and by-laws of the organization and the statute of the State under which it is formed. Alexander, et al. v. Parker, 144 Ill. 355.

Fraternal beneficiary societies when organized under the laws of this State are controlled by the statutory provisions and have only such powers as are granted to such societies, and they may have such implied powers as are necessary to carry on the purposes of the organization.

The powers of the society under consideration were created by Ch. 73, Par. 488, Ill. State Bar Stats. 1935, which provides that payment of death benefits be made only to the class enumerated in the act. Under this act payment by the society of funeral expenses would have to be upon an implied power of the society to make the payment necessary for the burial of its member.

In the instant case the charter of the society provides that the object for which the corporation is formed is to unite eligible persons of Slovene nationality and to "provide death, funeral, sick, accident and disability benefits for its members, which said benefits are to be paid from assessments to be levied and collected from its members as provided for in the by-laws of said society."

In conformity with this provision, the society's by-laws were passed, and section 4 provides that if a member is unable to pay assessments on account of a strike or suspension of employment,

[illegible]

he may become a passive member excused from payment of dues and assessments. And further, that the society "shall pay" not more than $250 death benefit for any passive member, and it is upon this provision for the death benefit that payment to the plaintiff beneficiary is questioned by the defendant. The membership certificate issued to Frank Slansek provides for payment in these words:

> "A sum not less than $5.00 and not to exceed $250 can be paid for his or her funeral expenses and deducted from the full amount."

Section 1 of the statute, which we have herein quoted, seems to be conclusive when we consider these words:

> "The payment of death benefits shall only be paid to the * * * person or persons within the above (designated) classes."

of which the plaintiff is one.

The plaintiff desired to receive the amount due under the membership, in order to pay the funeral expenses of her late husband. These expenses she had arranged for and notified the defendant of this fact.

In support of its position the defendant relies upon Article 27, Sec. 1 of the By-laws, which provides that upon the death of the member in good standing the defendant is to pay the amount provided for in the membership certificate, less an amount not to exceed $250 for funeral expenses. This provision does not qualify Section 4 of the by-laws, where the amount provided for is payable to the plaintiff beneficiary, and this payment is not restricted by any provision of the by-laws which would properly permit the defendant to deduct an amount from the sum provided for in the by-laws.

The conclusion we have reached is based upon the By-laws of the Society, and authorities are cited by both sides upon the question of the right of such society to provide for the burial of its members. The controverted question is whether the society had the right under the powers granted by the statute to provide by

its by-laws for the burial of its members and to deduct the amount expended therefor from the amount allowed the beneficiary. We are of the opinion that Section 4 of the By-laws is in accord with the provisions of the statute above quoted, and that it was proper to provide that $250 death benefit be paid upon the death of a passive member of the society.

For the reasons stated, we think the trial court properly entered judgment for the amount set forth in this opinion for the plaintiff, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

38920

37

MARY HOOKS, (Plaintiff) Appellant, v. PULLMAN PORTERS BENEFIT ASSOCIATION, OF AMERICA, INC., (Defendant) Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 617

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago for the defendant. The action was instituted in the Municipal Court by the plaintiff against the defendant to recover the proceeds due under a certain benefit certificate issued by the defendant, a fraternal benefit society, to one William S. Hooks, a member, and husband of the plaintiff.

The cause was submitted to the trial court upon a stipulation of facts, and a finding and judgment was entered in that court against the plaintiff and in favor of the defendant, from which this appeal is taken.

The stipulation of facts is substantially that the defendant is a fraternal benefit society and on February 24, 1922, issued Benefit Certificate No. 5589 to William S. Hooks, member; that this member was at the time married to one Amelia Hooks and had a mother living, Emma A. Wilson; that the name of the beneficiary to whom the death benefit was to be paid was Amelia Hooks, wife of the named member, and the name of the alternative beneficiary to whom the death benefit was to be paid if first named beneficiary stated above did not survive the applicant was Emma A. Wilson.

It also appears from the stipulated fact that the first named beneficiary, Amelia Hooks, died on August 4, 1924; that the member, William S. Hooks, married the plaintiff in Chicago, Illinois, on February 24, 1928, and subsequently died on May 30, 1935, at Chicago, leaving surviving him his widow Mary Hooks, plaintiff, and

his mother Emma A. Wilson, alternative beneficiary; that during the lifetime of the member William S. Hooks, no change of beneficiary was ever made by him, and therefore upon the death of the member, the defendant became liable to pay to the person properly entitled under said certificate the sum of $983.05; that at the time of his death he was living with his wife Mary Hooks, in Chicago, and his mother Emma A. Wilson was living in the City of New York and was not dependent on the member.

As a general proposition, we can agree with the plaintiff that the fundamental purpose of a fraternal benefit society is to furnish aid and assistance to its members, their families and dependents, and it is contended by plaintiff in this connection that the alternative beneficiary named in the certificate in the instant case was not a member of the insured's family within the meaning of the law of fraternal benefit insurance.

It is the general rule of law that the beneficiary who is living at the time of the death of the member of the fraternal insurance society is entitled to the amount payable upon his death, and this question is largely dependent upon the statute.

The Fraternal Beneficiary Act of Illinois, Ch. 73, Pars. 488 to 510 (Illinois State Bar Stats. 1935), is controlling in the acts of the defendant as a fraternal benefit society, organized and doing business under the provisions of the act.

This act, among other things, provides that

> "The payment of death benefits shall only be paid to the families, heirs, blood relations, ascending or descending wife, husband, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-children, step-brother, step-sister, children by legal adoption, parents by legal adoption, affianced wife, or affianced husband of the member, a person or persons upon whom the member is dependent, a person or persons dependent upon the member, or to a trustee for the sole benefit of any person or persons within the above classes. Within the above restrictions each member shall have the right to designate his or her beneficiary

> or beneficiaries, and, from time to time have the same changed in accordance with the laws, rules and regulations of the society, * * *"

And so the question arises in this litigation whether the widow of the deceased is entitled to the amount payable under the provisions of the beneficiary certificate, where she was not designated subsequent to the death of the first wife, Amelia Hooks, and therefore entitled to the amount due as against the alternative beneficiary, who is named in the certificate as Emma A. Wilson, the mother of the deceased member.

It is to be noted from the statutory provision above quoted that the member has the right to designate his or her beneficiary or beneficiaries, and from time to time have the same changed in accordance with the law, rules and regulations of the society. This was not done by the member in his lifetime, and this provision is further amplified by the by-law of the defendant, which provides that

> "Every member of the association in filing application for membership shall designate a person or persons who shall be the beneficiary or beneficiaries towhom payment of any death benefit is to be made in case of death of the member, and an alternative beneficiary or beneficiaries to whom payment of the death benefit is to be made in case the first named beneficiary or beneficiaries do not survive the member.
>
> Such beneficiary or alternative beneficiary shall be confined to: wife of the member, his children, his parents, his brothers or sisters, other blood relatives or persons dependent upon him for support."

Therefore the beneficiary Emma A. Wilson, the member's mother, who resides in New York, was properly named by the member at the time he became a member of the defendant society.

The theory of the plaintiff in this action is that a certificate of insurance in a fraternal benefit society is testamentary in character and speaks as of the death of the member; that payment of proceeds thereunder is governed by the status of the parties claiming at that time, and that Mary Hook, though not named in the certificate, occupies the status of the first named beneficiary, and is there-

on benefit [illegible], [illegible] in accordance with the [illegible] society, . . ."

And so the question rises in this [illegible] the deceased is [illegible] the [illegible] of the beneficiary [illegible] account to the [illegible] entitled to the [illegible] who is named in the [illegible] the deceased member.

It is to be noted [illegible] quoted that the [illegible] fidelity or beneficiaries, [illegible] in accordance with the [illegible] This was not done [illegible] is further amplified by the [illegible]

"Every member of the association is joining application for membership shall designate [illegible] the beneficiary or beneficiaries [illegible] benefit is to be made in case of death of the [illegible] or alternative beneficiary or beneficiaries to whom payment of the death benefit is to be made in case the first named beneficiary or beneficiaries is not living at the member's death.

Such beneficiary or beneficiaries may be changed by the wife of the member, the husband, the member, his brothers or sisters, other blood relatives or persons dependent upon him for support."

Therefore the beneficiary Edna [illegible], the [illegible] widow, resident in New York, was properly named by the member at the time he became a member of the benevolent society.

The theory of the liability in this action is that a certificate of insurance in a fraternal benefit society is treated by its character and agreements as of the date of the member's last payment of assessments thereunder is governed by the status of the insured at that time, and that they hold, though not named in the certificate, occupies the status of the irrevocable beneficiary, and is trans-

fore entitled to the amount provided for by the certificate, to the exclusion of the alternative beneficiary named in the certificate, because she did not reside with the member at the time of his death and was not dependent upon him.

Counsel for the plaintiff in the discussion of the law which governs in cases of this kind, points to the case of Modern Woodmen v. Allin, 301 Ill. 119, where the court held that a provision in a benefit certificate which reads that the benefit fund shall "be paid at his (the member's) death to wife and children," without naming them, means that the fund shall be paid to such persons as answer the description of wife or children at the death of the member; and if the first wife dies and the member marries again, the second wife, in the absence of any express change of beneficiaries, is entitled to share in the benefit fund with deceased member's living children. It is to be noted from this opinion that the court in passing upon the question of the designation of the beneficiary said:

> "Our attention has not been called to a decision of this or a similar question by any court of last resort. A few intermediate courts of appeal have passed on the question but their decisions are not in harmony. We are then left to decide the question from a consideration of the language of the certificate and of the object of benefit societies to afford protection to the families and dependents of members of such societies after the member's death. We know of no valid objection to a member designating beneficiaries by classes, such as children, or wife and children, as was done, in this case. If instead of designation by classes they had been designated by their individual names they would take by that description if living at the death of the member."

It is unfortunate that the plaintiff was not designated by her late husband as one of the beneficiaries, or the beneficiary, to receive the amount due under the policy.

The Supreme Court in its opinion in the case of Modern Woodmen v. Allin, 301 Ill. 119, held that where an individual is designated as the beneficiary, he would then be entitled upon the death of the member to the amount due under the certificate.

The point stressed by the plaintiff is that the mother, Emma A. Wilson, not being dependent upon the bounty of the member in his lifetime, cannot under the terms of the statute recover the amount due. This of course without taking into consideration the provisions of the statute and the by-laws under which a member may designate a parent as a beneficiary.

Our conclusion that a member may designate a parent is based largely upon the construction of the by-law enumerating the classes within which the member may name his beneficiary, "or persons dependent upon (him) the member" for support. The language above quoted would indicate an alternative provision, that is, the member could name a beneficiary within the classes enumerated in the by-laws who was not dependent upon him for support.

This reasoning would apply to the instant case, and we believe under the construction outlined, that William H. Hooks made a proper designation when he named Emma A. Wilson as the alternative beneficiary, in case of the death of Amelia Hooks, his wife and first named beneficiary, to succeed to the amount due and payable upon his death, for the reason that he did not designate any other beneficiary in his lifetime.

For the reasons stated in this opinion, the judgment entered in the Municipal Court for the defendant is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND ROSS C. HALL, J. CONCUR.

[illegible]

The point [illegible]

Upon i. [illegible] in his lifetime, [illegible] amount due. [illegible] provisions of the [illegible] designate a [illegible].

Our conclusion [illegible] based largely upon the [illegible] clearer within [illegible] persons [illegible] above [illegible] member could [illegible] the by-laws [illegible].

[illegible] be believe [illegible] made a proper [illegible] alternative [illegible] his wife and [illegible] and payable upon [illegible] any other [illegible].

For the [illegible] in the [illegible] [illegible].

[illegible]

38

39000

NATIONAL BUILDERS BANK OF CHICAGO, Administrator of the Estate of Lottie Gold, Deceased, and ABE GOLD and PEARL GOLD, (Plaintiffs) Appellees, v. A. A. SPRAGUE and BRITTON I. BUDD, Receivers for Chicago Rapid Transit Company, a Corporation, (Defendants) Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

289 I.A. 618

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a suit instituted by the plaintiffs to recover damages for the alleged negligence of the defendants as receivers of the Chicago Rapid Transit Company, a corporation, in the operation of its elevated railroad. A single complaint was filed by three plaintiffs, alleging damages for personal injuries to two of the plaintiffs and for the alleged wrongful death of the intestate. Abe Gold and Pearl Gold sued for damages alleged to have been sustained by them individually, and National Builders Bank of Chicago sued as Administrator of the Estate of Lottie Gold, deceased. Three separate and distinct causes of action were stated in the one complaint, and three separate and distinct verdicts and judgments were returned and entered in favor of the plaintiffs, respectively.

The defendants were sued as receivers of the Chicago Rapid Transit Company, and answered the complaint and defended as such.

The three cases were tried together, the alleged causes of action arising out of one accident, which occurred at the intersection of Elmwood avenue and the tracks of the elevated Railroad in Berwyn. Pearl Gold is Abe Gold's daughter, and Lottie Gold, plaintiff's intestate, was the wife of Abe Gold. The three of the named persons

Administrator of the estate of
Lottie Wells, deceased, and
[illegible]

Plaintiffs-Appellees,

v.

A. A. Shaver and William A. Wells,
Receivers for Chicago Rapid Transit
Company, a corporation,

Defendants-Appellants.

Mr. Justice Crane delivered the opinion of the court.

This is a suit instituted by the plaintiffs to recover damages for the alleged negligence of the defendants, receivers of the Chicago Rapid Transit Company, a corporation, in the operation of its elevated railroad. A single counsel filed by three plaintiffs, claiming damages for personal injuries to two of the plaintiffs and for the alleged wrongful death of the latter's son. Lottie and Henri Wells sued for damages claimed to have been sustained by them individually, and Frederick Wells, the son of Chicago, sued as Administrator of the estate of Lottie Wells, deceased. There separate and distinct counts for action were filed in the one declaration, and these separate and distinct verdicts and judgments were returned and entered in favor of the plaintiffs, respectively.

The defendants were sued as receivers of the Chicago Rapid Transit Company, and operated the elevated as joint[illegible] as such.

The three cases were tried together, the fatal accident of Henri Wells arising out of one incident, which occurred at the intersection of Elmwood Avenue and the street of the Elevated railroad in Oregon. Henri Wells is the "Wells" daughter, and Lottie Wells, plaintiff, intestate, was the wife of A. C. Wells. The three of the named persons

were riding in an automobile driven by Abe Gold on September 25, 1934, and while crossing the Elevated Railroad tracks, where the train was being operated upon the surface of the ground, shortly after midnight, they were struck and injured by the train.

In this action no point is made upon the pleadings, except defendants' contention that the plaintiffs failed to establish the material allegations of the complaint.

Elmwood avenue at the place where the accident occurred runs north and south, and one block east of Elmwood is Ridgeland avenue, also running north and south. Defendants' tracks cross Ridgeland and Elmwood avenues at right angles. There are two tracks, one each for eastbound and westbound traffic, and the power used to operate the train is electric. The electricity passes through a so-called third rail, and furnishes the power to operate the motor upon the motor car used to move the train. The first east and west street south of defendants' tracks is 22nd street or Cermak road. Elmwood avenue has an over all width of 64.1 feet, and the paved portion is 29.2 feet. Defendants' right of way is 69.19 feet wide. On the south side of the right of way, running parallel therewith, is an alley 16.4 feet wide. Immediately north of and parallel with defendants' right of way is another alley 17.5 feet wide. The two alleys and the right of way together are 103.09 feet wide. From the east curb line of Elmwood avenue to the west curb line of Ridgeland avenue is 303.7 feet. There is no station at Elmwood avenue, but there is a station at Ridgeland avenue. Adjoining Elmwood avenue and the defendants' tracks and the alleys we have above described, are a number of buildings on both sides of the railroad right of way, which appear to be apartment buildings. There is also at the intersection of Elmwood Avenue and the tracks a signal tower with a crossing sign marked "Railroad Crossing", and also a sign of danger

and a stop sign attached to this tower; also a danger light and crossing bell, and from an examination of certain photographs appearing as exhibits in the record, it appears that the construction of the third rail stops before it reaches the crosswalk and the street crossing.

The accident took place on September 25, 1934, shortly after midnight, about 12:20. The automobile was northbound and the train waswestbound.

Abe Gold, one of the plaintiffs, testified that his daughter, Pearl, was working at the Walgreen Company located at Ridgeland and Twenty-second street; that on the evening of September 24th, or early morning of the 25th, he and his wife went in his car for her where she was employed; that when his daughter entered the car he was on Ridgeland avenue, north of 22nd street; that he turned on 22nd street and went west to Elmwood, and then turned north on Elmwood. After turning on Elmwood there was a Ford car in front of him and a truck in front of that, both traveling north; that the truck and the other car passed over the tracks and when the plaintiff got there he slowed down, stopped and looked around, and did not see anything; that he looked to the east and west to see if there was anything coming, and then followed on, and when he was at about the middle of the track the train struck his car; that he was in second speed; that he did not see any lights and there was no whistle and no warning; that when he got to about the middle of the second track - westbound - he was hit; that he had passed this crossing before on Elmwood, and had seen the stop sign and the crossing sign, but was not sure whether he had ever noticed any red light on the post or danger sign; that he had never had occasion to look, because it was always clear and he went through; that when he first looked he was near the alley south of the railroad tracks; that he had not reached the first track; was about five or seven feet from it; that he looked east and could see all the way down to Ridgeland avenue,

and could see the station there; that at the time he completed his looking his car was not on the eastbound track; that he looked before he shifted when his car was about five feet away from the track; that he then shifted into second and started across; that when he got on the eastbound track he did not look but he was going; that all he did was to pay attention to his car, and he did not see what the truck ahead of him did; that before he got on the track he looked when he was five feet east of the eastbound track; that he did not look in either direction after that, and from there he did not look at all, and when he started up he only looked straight north; that he did not see any train at all; that when he got out of his automobile after the accident was about the first time he knew he was hit by a train; that at the time he crossed the eastbound track he was not going faster than 10 or 12 miles an hour, and when he was between the first and second track, only about 10 miles an hour; that the brakes on his car were good and that he could stop the car on a dime, and that he had driven a car for more than 12 years.

Plaintiff, Pearl Gold, testified substantially the same as her father. She testified that she was in the rear seat on the left-hand side, immediately behind her father, and her mother was in the rear seat on her right; that her father was in his position at the wheel; that she never noticed any warning signals on the crossing or where the warning signals were located, and had never heard of any before that night, and that none were ever rung or displayed when she had crossed at that place, and as far as she knew there were none there at that time. She further testified that they were traveling about 10 miles an hour as they approached the alley and slowed down and stopped just long enough to look around; that her father looked out and around, and she looked to the east; that she did not know whether her father looked to the east, but she saw him look around;

that she could see Ridgeland avenue; that there was nothing to obstruct the view; that the night was dark; that she could seek the lights at the Ridgeland station and the street lights over the crossing at Ridgeland; that she did not see any train; that when they got on the eastbound track she looked again, but she saw no lights except at the station and the street lights at Ridgeland; that she did not look again thereafter and did not remember anything after crossing the first tracks until she found herself in the hospital; that she did not remember hearing any whistle; that she did not at any other time hear bells at that crossing, and in that accident her mother, Lottie Gold, was killed.

There is evidence of witnesses who testified that they were present on the night in question; that there was no danger signal as the train approached; that it was a clear night, and one of the witnesses testified that as he crossed the tracks he could see to the Ridgeland avenue station and that the lights were burning on the platform. There was other evidence to the effect that the only signal given was just at the time or prior to the accident, when the sound of a loud whistle was heard, and the crash followed.

On the question of lights on the train there is evidence by witness David R. Wendell, who testified he was on the train in the second coach; that just before the accident the lights went out in the train, and that it traveled about 100 feet with the lights out before the impact. He further testified that as the train crossed Ridgeland avenue the lights went out, and as soon as they got across Ridgeland avenue the lights came on again, and remained on for about 50 feet, and then went off and stayed off.

The facts are in dispute, which is evident from the testimony of the witnesses who were heard at the time of the trial.

The defendants' position regarding the evidence is that

the court not only at the close of the plaintiff's case, but also at the close of the hearing upon all the evidence, should have directed a verdict for the defendants.

The question is a close one as to the negligence of the defendants, and in order that the trial might be fair and orderly, the discussion of the attorney's at the close of the hearing of the evidence should have been upon the facts as they appeared in the record. It does appear, however, that counsel for the plaintiffs in arguing before the jury made several statements which were not justified by anything in the record. In the discussion of the facts counsel for the plaintiffs sought to introduce certain newspapers having some bearing upon the operation of these trains on the surface of the street crossings, and the advocacy by them of safety measures. Counsel for the defendants objected to the exhibition of these newspapers by counsel for the plaintiffs, and this objection was sustained by the court. Just what influence these publications would have upon the jury in arriving at a conclusion, is not made clear.

It also appears that counsel for the plaintiffs made this statement in his argument before the jury:

> "One more thought about this contributory negligence, you know the court is going to give you a lot of instructions. Each instruction, you will recall, says, 'If you believe so and so to be the fact, then so and so is the law.' The lawyer for the defendants prepares whatever theory he has for his instruction and then the lawyer for the plaintiffs whatever theory he has and submits them to the court. The court only passes on whether or not the conclusions on the law are correct and if the facts are right. In this case the defendants gave 40 instructions and I have given 3 or 4."

To make this statement before the jury was clearly erroneous. It was in effect an effort to prejudice the jury against the defendants in this action. Calling attention to the fact that the defendants had given 40 instructions and the plaintiffs 3 or 4, was clearly in violation of the rule that the court is the author of the instructions when he directs the attention of the jury upon the questions contained in the instructions. If counsel would bear in mind that the instructions

are not counsel's instructions, but are given by the court to guide the jury as to the law upon the questions involved in the trial of the case, he would not make a statement such as was made in his argument to this jury. The court had not instructed the jury at the time, and of course there was nothing in the record which would indicate that the number given for each of the parties was known and in the record.

That is not all regarding this argument complained of by the defendants. When counsel stated in the presence of the jury and called attention to the fact that defendants had shadowed the witnesses on December 24, 1935, he admitted that this was merely his inference and not evidence in the case. Then why discuss it if it is not properly in the record for the purpose of proving the issues involved in this trial? Again, counsel for plaintiffs made this statement:

> "I want you to remember when you get back to your place of business, when you think of this unfortunate woman, to think of these youngsters, ask yourselves the question, 'Have I done my duty to my fellowmen?' Heaven help your verdict, may it be mine. You may answer the question in the affirmative."

And then after making this statement, which was clearly an erroneous one, counsel concludes by saying:

> "I want to thank you and ask you in the spirit of decency and in the spirit of the season and in the spirit of the holidays, gentlemen, to be fair to everybody concerned. Don't be carried away. * * *"

This was objected to and the objection was sustained by the court.

Of course both sides in the trial of a case are entitled to a fair hearing, and arguments of counsel should be based upon the facts as they appear in the record, but the hearing is never fair where counsel tries to influence the jury by statements tending to create passion or prejudice. In this case counsel should have restrained himself in making an argument which might tend to influence the jury and prejudice the rights of the defendants. It is to be regretted that his argument for the plaintiffs was an appeal not

justified by the facts, and as it was clearly erroneous it will be necessary to reverse the judgment and remand the cause for further trial.

It also appears from the record that judgment was entered against the defendants, as individuals and not against the defendants as receivers to be paid in due course of their administration.

Attorneys for plaintiffs point to the Civil Practice Act Ch. 110, Sec. 220, Ill. State Bar Stats. 1935, which provides that in all appeals the reviewing court may, "in its discretion and on such terms as it deems just, * * * order or permit the record to be amended by correcting errors or by adding matters which should have been included." Counsel for the defendants reply by stating that it was necessary for defendants to appeal in order to call to the attention of the Appellate Court the form of judgment which was entered. While it is true that the court may of its own motion direct that the record be amended to correct errors by adding matters that should have been included therein, the same right was given the plaintiffs in this case, but no motion was made, nor was an order entered in the trial court correcting the judgment by adding the words, "and that the same be paid by the receivers in due course of their administration." We will assume that counsel for plaintiffs knew the law, and it was his duty to make a motion to correct the record.

In considering the facts as they appear in the record this court does not intend to create the impression of expressing an opinion as to the merits of the controversy.

For the reasons stated herein, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

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BECCA ALEXANDER and JENNIE LEVI, (Plaintiffs) Appellants, v. CHARLES H. STERN, et al., Defendants below, CHARLES H. STERN and MAURICE S. STERN, Individually and as Executors and as Trustees under the last Will and Testament of ESTHER STERN, deceased, (Respondents) Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY. 209 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendants moved the court to reconsider its ruling denying the motion of defendants to dismiss the appeal and to vacate the order denying said motion. In support of the motion the defendants show that the order or decree appealed from was entered on July 12, 1935, and notice of appeal was filed by the plaintiffs in the office of the clerk of the Superior Court on October 9, 1935, and a copy served on the defendants on October 14, 1935.

In the printed brief and argument of the defendants filed herein, the point is raised that the Appellate Court had no jurisdiction to entertain this appeal after the filing of the notice of appeal by the plaintiffs, which was filed in the office of the clerk on October 9, 1935, within the ninety days provided for by the Civil Practice Act. Ch. 110, Par. 204, Sec. 76, Sub-section (1), Ill. State Bar Sts. 1935.

The plaintiffs filed their petition for leave to appeal to this court on July 13, 1936, which was after the expiration of ninety days and within a period of one year from the date of the judgment, and the defendants, in support of their motion, contend that in the above entitled cause a judgment was entered for the defendants on July 12, 1935, and that the bill of complaint was dismissed by the court for want of equity. Further in support of their motion, the

defendants call our attention to the case of People ex rel Martha L. Bender Adm. Petitioners, v. Joe A. Davis, Judge et al. Respondents, Illinois Supreme Court December, 1936, Doc. No. 23662, wherein the court says:

> "The right to appeal is absolute if exercised within ninety days from the rendition of the judgment decree or determination of the Trial Court. Thereafter and within one year, the Appellant must show by affidavit that his appeal has merit, and that the delay was not due to his culpable negligence. But if an appellant files notice of appeal in the trial court within ninety days, he has taken his appeal * * *. He has had the appeal the legislature intended him to have * * *. There is nothing in the act authorizing a court of review to grant permission to an appellant to file its notice of appeal in the reviewing court after it had availed itself of the right within ninety days to file such notice of appeal in the trial court. When the original appeal was dismissed the suit was ended."

In the consideration of the defendants' motion it appears from the record that the plaintiffs filed a notice of appeal and proof of service in the trial court on October 9, 1935, and that by reason of the filing of this notice the appeal was taken, and this court is without jurisdiction to grant the appeal prayed for in plaintiffs' petition. The plaintiffs not having perfected their appeal after the filing of such notice, the original appeal was thereby ended and the court is without further jurisdiction to grant the plaintiff leave to appeal.

Therefore, the order granting the plaintiffs leave to appeal is vacated and set aside, together with the order of this court denying the motion of the defendants to dismiss the appeal for the reasons stated, and it is ordered that the defendants' motion to dismiss the appeal be allowed.

APPEAL DISMISSED.

DENIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

defendant will [illegible] therefrom [illegible] of [illegible]

Bender [illegible], Petitioner, v. [illegible]

Illinois Supreme Court December, [illegible], [illegible]

court says:

> "The right to appeal [illegible] namely give [illegible] the respondent [illegible] determination of the trial court, [illegible] year, [illegible] his merit, [illegible] diligence, [illegible] the trial court [illegible] * * *. He has [illegible] to have [illegible] court of [illegible] its notice of appeal [illegible] availed itself of the right [illegible] notice of appeal in the trial court, then the original appeal was dismissed [illegible]."

In the consideration of [illegible] defendants' motion it appears from the record that [illegible] filed [illegible] notice of appeal [illegible] proof of service [illegible], and by reason of the filing of [illegible] and [illegible] the court is without jurisdiction [illegible] for plaintiffs' petition. [illegible] repeal after the filing of [illegible], the [illegible] by ended and the court [illegible] plaintiff leave to appeal.

Therefore, the order [illegible] is vacated [illegible], together with the [illegible] of the court denying the motion [illegible] reverse [illegible] dismiss the appeal [illegible].

[illegible]

DOVE, P. J., [illegible], J., [illegible], J., [illegible].

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AGATHA JANUSZ,
Appellant,

v.

DR. LEWIS KENT EASTMAN,
Appellee.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

289 I.A. 618

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Agatha Janusz, seeks to reverse an order entered October 18, 1935, vacating the trial court's prior order of September 16, 1935, which set aside the judgment theretofore rendered against plaintiff July 5, 1934, and allowed plaintiff to file within twenty days her answer to defendant's special plea.

Plaintiff filed her second amended declaration May 4, 1935, charging defendant, a physician, with negligent treatment of her ailments. May 16, 1935, defendant filed a plea of the general issue and a special plea, alleging in substance that he was a duly licensed physician and surgeon and regularly practiced his profession in Chicago for a long time prior to attending plaintiff; that the injuries and ailments of plaintiff mentioned in her second amended declaration, which he was hired to treat, were sustained by reason of plaintiff being struck by an automobile being operated by the New Way Home Service Corporation and one Victor Buklewicz; that in his endeavor to cure and heal plaintiff of said injuries and ailments he rendered the professional services alleged in her declaration; that plaintiff "made claim against" the New Way Home Service Corporation and Buklewicz on account of

[illegible]

[illegible]

[illegible]

[illegible]

MR. MARTIN [illegible]
[illegible]

MR. [illegible]
[illegible]

By this amended plaintiff's petition therein, leaves to prevent an order entered October 16, 1942, vacating the total amount of union order of September 5, 1938, which [illegible] wherefore therefore requested against plaintiff July 6, 1944, and filed plaintiff to file within 5 days her answer to defendants special plea.

Plaintiff filed her second amended declaration May 1, [illegible] of her claims, May 11, 1945, defendants filed a plea of the general issue and a special plea, alleging in such manner that he was a duly licensed [illegible] and [illegible] pursuant his purchasing in Ohio on a [illegible] plaintiff; that the injunction and [illegible] of plaintiff mentioned in her second amended declaration, which he [illegible] to answer, were sustained by [illegible] being opposed by the [illegible] Vision Foundation; that in his [illegible] on said injunction [illegible] alleged in her declaration; that [illegible] the New Jersey Home Service Corporation and [illegible]

her said injuries, charging said injuries were sustained by her as a result of the aforesaid automobile striking her; and that on June 16, 1931, she settled her claim against said New Way Home Service Corporation and Buklewicz for $13,750 and gave them the following written release:

"Know All Men By These Presents, That for and in consideration of the sum of thirteen thousand seven hundred and fifty ($13,750) to the undersigned in hand paid, receipt whereof is hereby acknowledged, I, Agatha Janusz, for myself, my heirs, executors and administrators, hereby forever release, acquit and discharge New Way Home Service Corporation, a corporation, its agents and servants, and Victor Buklewicz, his heirs, executors and administrators, and each of them, of and from any and all claims, demands, actions and rights of action of whatsoever nature and howsoever arising from the beginning of the world to the date hereof, which the undersigned now has or might have against said New Way Home Service Corporation, a corporation, and Victor Buklewicz, and each of them, and particularly, but not in limitation of the foregoing, of and from any and all claims, demands, actions and rights of action which the undersigned now has or might have against said New Way Home Service Corporation, a corporation, its agents and servants and Victor Buklewicz, his heirs, executors and administrators, and each of them, resulting from an automobile accident occurring on or about the eighth day of February, 1930, at or near the intersection of Kostner Avenue and Division Street, in the City of Chicago, County of Cook and State of Illinois

"In Witness Whereof, I have hereunto set my hand and seal this 16th day of June, A. D. 1931.

her
"Agatha X Janusz (Seal)
Mark

Witness to Signature:
James A. Tracy
Address

C. Helmer Johnson, 130 N. Well St.
Address"

Plaintiff's general and special demurrer to defendant's special plea was overruled June 8, 1935, and she was granted leave to file an answer to said special plea within fifteen days. July 5, 1935, plaintiff having failed to file an answer and electing to stand by her demurrer upon defendant's motion to dismiss, judgment was entered on the pleadings in his favor and against plaintiff. Thereafter August 2, 1935, within the same term and also within thirty days from the entry of the judgment, plaintiff filed her verified petition in which she alleges substantially

her said injuries, which in said injuries were proximately caused
as a result of the aforementioned [illegible] in [illegible] and that
on June 14, 1981, she entered her office upon [illegible] Long Island
Service Corporation and [illegible] from [illegible] given them the
[illegible]

"Know All Men By These Presents, that for and in consid-
eration of the sum of [illegible] Dollars ($[illegible],750.00) to the undersigned in hand paid, receipt whereof is
hereby acknowledged, I, [illegible], for myself, my heirs,
executors and administrators, hereby forever release, acquit and
discharge the [illegible] Corporation, a corporation, its
agents and servants, and [illegible] and [illegible], their successors
and administrators, and each of them, of and from any and all
claims, demands, actions and rights of action of [illegible] nature
and however arising from the [illegible] of the [illegible] to the date
hereof, which the undersigned now has, or which have against said
New York Home Service Corporation, a corporation, and [illegible]
[illegible] and each of them, and particularly, but not in limitation
of the foregoing, of and from any and all claims, demands, actions
and rights of action which the undersigned now has, or may hereafter have
against said New York Home Service Corporation, a corporation, its
agents and servants and [illegible], its heirs, successors
and administrators, and each of them, [illegible] from an [illegible]
accident occurring on or about the [illegible] day of [illegible], 1981,
at or near the [illegible] of [illegible] and [illegible] Streets,
in the City of [illegible], County of [illegible], State of [illegible].

"In Witness Whereof, I have hereunto set my hand and seal
this 16th day of June, [illegible], 1981.

"[illegible] (seal)

[illegible]
[illegible]
Witness

[illegible]
[illegible]
Witness

G. [illegible] [illegible], [illegible]
"Witness"

Plaintiff's counsel in chief demanded to [illegible] Fundamis
special plea was overruled June 6, 1985, and [illegible] was granted leave
to file an answer to said special plea within [illegible] days. On
6, 1985, plaintiff moved [illegible] to file an answer [illegible]
to stand by his demurrer [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

that by reason of the negligence and malpractice of defendant she suffered serious and permanent injuries, as a result of which she is now completely incapacitated physically and unable to leave her bed, and will remain bedridden for the rest of her life; that "several declarations and demurrers thereto were filed by plaintiff and defendant, respectively, and finally to the plaintiff's second amended declaration defendant filed a special plea May 16, 1935," to which her ~~xxxx~~ former attorney did not file an answer after her demurrer to same had been overruled; that she was not advised of the order of June 8, overruling her demurrer to said special plea and of the judgment order of July 5, 1935; that she was physically unable to investigate the status of her case personally and that, although she repeatedly requested information as to same from her former attorney, she was unable to discover the true state of affairs; that she then advised her said former attorney that "she had never signed any release with regard to any claim for injuries which she suffered * * * particularly she never signed any releases or release as set forth in the defendant's special plea;" that she "is able to sign her name in the English language and has always been able to sign her signature either in the Polish script or the English script;" that "at no time has it ever been necessary for her to sign her name with the mark 'X';" that upon learning "the true state of affairs," she retained new attorneys in the place and stead of her former attorney and now desires leave to file her answer to said special plea of the defendant so that she may be afforded an opportunity to have this cause heard on its merits; and asked that the judgment against her of July 5, be vacated and that she be given leave to file her answer to defendant's special plea within twenty days.

The same day, August 2, 1935, plaintiff's former attorney was granted leave to withdraw his appearance and the law firm of Meyer & Meyer was granted leave to file its appearance in her behalf. Plaintiff was allowed to file her motion, supported by the aforesaid petition, to vacate and set aside the judgment of July 5, 1935, and the hearing on said motion was continued to September 16, 1935.

September 16, 1935, an order was entered upon an ex parte hearing vacating the judgment of July 5, 1935, and granting leave to plaintiff to file her answer to defendant's special plea within twenty days. On the following day, September 17, 1935, defendant moved to vacate the order of September 16, 1935, which motion the court ordered to be entered and continued until September 20, 1935. This last motion was heard October 18, 1935, and the court ordered that the order of September 16, 1935, vacating the judgment order of July 5, 1935, "be and the same is hereby vacated and set aside," thereby reviving the judgment in favor of defendant of the last mentioned date.

Plaintiff contends that the trial court had jurisdiction on September 16, 1935, to vacate the judgment previously entered against her and that its action in setting aside the order by which the judgment was vacated is not supported by the evidence. Defendant's theory is that the action of the trial court in setting aside the order of September 16, 1935, by which the judgment against plaintiff had been vacated, was proper and amply supported by the evidence; that the action of the court in entering the order of October 18, 1935, was discretionary and no abuse of its discretion is shown; and that plaintiff made no showing of facts sufficient to void defendant's special plea.

It is the established and practically universal rule that

The same day, August 8, 1958, plaintiff's counsel stipulated leave to withdraw his appearance and the law firm of Meyer & Meyer was granted leave to file its appearance in the behalf. Plaintiff was allowed to file her motion, supported by the aforesaid petition, to vacate and set aside the judgment of July 5, 1958, and the hearing on said motion was continued to [illegible], 1958.

September 16, 1958, an order was entered upon the petition bearing vacating the judgment of July 5, 1958, and granting leave to plaintiff to file her answer to defendant's amended plea within twenty days. [illegible] moved to vacate the order of September 16, 1958, which motion the court ordered to be [illegible] until hearing until September 22, 1958. This last motion was [illegible] September 22, 1958, and the court ordered that the order of September 16, 1958, vacating the judgment order of July 5, 1958, "be and the same is hereby vacated and set aside," thereby reviving the judgment in favor of defendant of the first mentioned date.

Plaintiff contends that the trial court had jurisdiction on September 16, 1958, to vacate the judgment previously entered against her and that its action in [illegible] aside the order by which the judgment was vacated is not supported by the evidence. Defendant's theory is that the action of the trial court in setting aside the order of September 16, 1958, by which the judgment against plaintiff had been vacated, was proper and amply supported by the evidence; that the action of the court in entering the order of October 22, 1958, was [illegible] and no abuse of the discretion in [illegible] vacating [illegible].

It is the contention and probable jury instructed that

a settlement with and release of all rights to recover against an original tort feasor by the injured person, operates as a bar to another action for malpractice against the physician or surgeon who treated and is charged with aggravating the injury. (Adams v. DeYoe, 166 Atl. [N. J.] 485). In Guth v. Vaughan, 231 Ill. App. 143, the plaintiff was injured by being struck by an automobile operated by one Florsheim, and the defendant, Dr. Vaughan, treated the plaintiff for such injuries. Plaintiff settled her claim against Florsheim for $225 and later brought an action against Dr. Vaughan to recover damages from him on account of his alleged negligence in treating her injuries. It was held that the settlement with Florsheim was a bar to the action against Dr. Vaughan. In the course of its exhaustive opinion in that case the court said at pp. 149-150:

"In Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, where it was claimed by the plaintiff that one of his arms had been broken by reason of defective workmanship by the defendant in constructing and erecting a certain derrick, the court said, in considering the enhancement of damages as the result of malpractice, that if the plaintiff exercised ordinary care to keep the broken parts of the arm together and used ordinary care in the selection of surgeons and doctors and nurses, and employed those of ordinary skill and care in their profession, and yet, 'by some unskilful or negligent act of such nurses or doctors or surgeons, the parts became separated and a false joint was the result, appellant, (defendant) if responsible for the breaking of the arm, ought to answer for the injury in the false joint.' And, further, 'the liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care), the injury ensuing from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm.' Chicago City Ry. Co. v. Saxby, 213 Ill. 274; Chicago City Ry. Co. v. Cooney, 196 Ill. 466; Variety Mfg. Co. v. Landaker, 227 Ill. 22; 26 Cyc. 1384. In the Landaker case, supra, the court sanctioned an instruction that contained the following: 'The law regards the injury resulting from the mistakes of the physician, or from the failure of the means employed to effect a cure, as a part of the immediate and direct damages flowing from the original injury.' 6 Thompson on Negligence, sec. 7211; Purchase v. Seelye, 231 Mass. 434; Suelzer v. Carpenter, 183 Ind. 23.

"It follows, therefore, that, if there had been evidence that Florsheim was liable for the injury to the plaintiff, he would have been liable for the effects of the alleged malpractice of the defendant and that the release which was given to Florsheim would be a bar to the present suit by the plaintiff against the defendant."

It necessarily follows that if the facts set forth in plain-

a settlement with and release of all rights to recover against an original joint tortfeasor by the injured person, or bar it a bar to another action for multiple damages the physician or surgeon who treated and is charged with negligently the injury. (Adam v. DeVoe, 166 Ark. [4, 4] 465). In Smith v. Vaughan, 221 Ark. 142, the plaintiff was injured by being struck by an automobile operated by one Florenheim, and the defendant, Dr. Vaughan, treated the plaintiff for such injuries. Plaintiff settled her claim against Florenheim for $800 and later brought an action against Dr. Vaughan to recover damages from him on account of his alleged negligence in treating her injuries. It was held that the settlement with Florenheim was a bar to the action against Dr. Vaughan. In the course of the unanimous opinion in that case the court said at pp. 145-146:

"In Williams Pulse Co. v. Lindsey, 140 Ark. 3, where it was claimed by the plaintiff that one of the same has been broken by reason of defective instructions by the defendant in constructing and erecting a wireless machine, we said, in considering the enhancement of damages on the ground of negligence, that if the jointly and severally liability cause to keep the broken parts of the new together unimpaired ordinary care in the selection of surgeons and doctors and nurses, and employing them on ordinary skill and care in their professions, and proof, by some qualified negligent act of such nurse or doctor or surgeon, the punishment became aggravated and a joint tort was the result, opposition (defendant) is responsible for the burdening of the tort, unless the answer for the injury in the joint tort, and another, the liability to mistaken in omitting to find fault to a broken arm, and where such mistaken cause (the injured party making certain) the injury enough from such which the properly regarded the proof of the immediate and direct damages resulting from the breaking of the arm." Williams Pulse Co. v. Lindsey, 140 Ark. 3; Wilson v. [illegible] 221 Ark. 142; [illegible] v. Thompson on negligence, sec. 7112; Lundgren v. Lindsey, 221 Ark. 144; Lambert v. Lewallen, 153 Ark. [illegible].

"It follows, therefore, that, if there had been evidence that Florenheim was liable for the injury to the plaintiff, he would have been liable for the injuries of the alleged malpractice of the defendant and that the release which was given to Florenheim would be a bar to the present suit by the plaintiff against the defendant."

It necessarily follows that if the tort-feasor in plain-

tiff's special plea are true, such plea is an effectual bar to plaintiff's action. As heretofore shown, defendant averred in his special plea that the ailments and injuries for which he treated plaintiff were the ailments and injuries suffered and sustained by her as the result of being struck by the automobile operated by the New Way Home Service Corporation and Buklewicz; that she made a claim against said corporation and Buklewicz for damages on account of her said injuries; that she made a settlement of such claim with said corporation and Buklewicz for $13,750; and that she gave them a written release of all claims and rights of action of every kind and nature which she had or might have against them, resulting from the automobile accident in question.

Neither in her verified petition filed in support of her motion to vacate the judgment, nor upon the hearing of defendant's motion to vacate the order setting aside the judgment, did plaintiff directly deny that she made the settlement alleged. On the other hand, attorney C. Helmer Johnson, who represented plaintiff, and attorney Abe R. Peterson, who represented the New Way Home Service Corporation and Buklewicz, both respected and reputable members of the Chicago bar, appeared before the court on the occasion of the hearing October 18, 1935, and stated that when plaintiff's action against the New Way Home Service Corporation and Buklewicz was reached for trial she settled her claim against said corporation and Buklewicz, the amount of the settlement was paid and she signed the release, a copy of which is included in defendant's special plea with her mark witnessed by attorneys James A. Tracy and C. Helmer Johnson.

But plaintiff insists that none of the witnesses was sworn at this hearing and therefore their evidence should be disregarded. Plaintiff prepared and had approved the report of proceedings of what took place at said hearing and incorporated same in the record filed herein. Inasmuch as it does not appear from said report of

iff's special plea and such, such plea in all material [illegible] plaintiff's motion. [illegible] defendant, averred in his special plea that the ailments and injuries for which he treated plaintiff are the ailments and injuries suffered and sustained by her as the result of being struck by the automobile operated by the Sun Ray Home Service Corporation and Hutchinson; that she made a claim against said corporation and Hutchinson for damages on account of her said injuries; that she made a settlement of such claim with said corporation and Hutchinson for $[illegible] and that she gave them a written release of all claims and rights of action of every kind and nature which she had or might have against them, resulting from the automobile accident in question.

Neither in her verified petition filed in support of her motion to vacate the judgment, nor upon the hearing of defendant's motion to vacate the order setting aside the judgment, did plaintiff directly deny that she made the settlement alleged. On the other hand, attorney C. Helmer Johnson, who represented plaintiff, and attorney [illegible] A. Peterson, who represented the Sun Ray Home Service Corporation and Hutchinson, both respected and reputable members of the Chicago bar, appeared before the court on the occasion of the hearing October 18, 1935, and stated that when plaintiff's action against the Sun Ray Home Service Corporation and Hutchinson was reached for trial she settled [illegible] the amount of the settlement was paid and the [illegible] a copy of which [illegible] witnessed by attorneys James A. [illegible] and C. Helmer Johnson.

But plaintiff insists that none of the attorneys was sworn at this hearing and therefore their evidence should be disregarded. Plaintiff prepared and had approved the report of proceedings of what took place at this hearing and incorporated same in the record filed herein. Therefore [illegible]

proceedings whether the witnesses were or were not sworn, it will have to be presumed that the hearing was properly conducted and that they were sworn. However, even though we assume that the witnesses were not sworn, no objection was offered to their testimony and plaintiff cannot now be heard to complain.

Defendant's special plea of settlement, convincingly established as it was, constitutes an absolute bar to plaintiff's action and it would have amounted to no more than an idle and futile gesture on the part of the court to have permitted the order vacating the judgment to stand.

For the reasons indicated herein the order of the Superior court of October 18, 1935, vacating the order of September 16, 1935, setting aside the judgment in favor of defendant is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

38868

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SYDNEY STEIN,
Appellee,

v.

HARRY STEINER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $4,200 entered against defendant, Harry Steiner, in an action tried by the court without a jury, brought by plaintiff, Sydney Stein, for commission claimed to be due him from defendant by reason of the sale by the latter of certain combination annuity and life insurance policies issued by the Equitable Life Assurance Society of the United States to persons introduced by plaintiff to defendant.

This action was instituted September 2, 1931, and the pleadings at the time of the trial consisted of the common counts, a plea of the general issue and a special plea, and replication. No question is raised on the pleadings. The issues were further defined by plaintiff's amended affidavit of claim filed October 11, 1935, and by defendant's affidavit of merits filed October 14, 1935.

Plaintiff's amended affidavit of claim alleges "that plaintiff's claim is based upon an agreement between plaintiff and defendant entered into in to-wit, the month of April, 1931, that defendant would pay to plaintiff one-half of any and all commissions received by defendant as a result of the sale or sales of annuity policies or bonds effected by defendant as a result of the introduction to defendant by plaintiff of any person or persons to whom such poli-

cies or bonds should be sold; that defendant sold certain annuity policies or bonds to certain persons as a result of an introduction by plaintiff. That there is due plaintiff from defendant, after allowing to him all just credits, deductions and set-offs, $4,200, together with interest thereon at the rate of 5 per cent per annum."

Defendant's amended affidavit of merits averred "that he did not enter into any agreement with plaintiff to pay to the plaintiff one-half (1/2) of any and all commissions received by the defendant as a result of the sale or sales of annuity policies or bonds effected by defendant as a result of the introduction to defendant by plaintiff of any person or persons to whom such policies or bonds should be sold; that defendant did not sell certain annuity policies or bonds to certain persons as a result of an introduction by plaintiff; that any introduction to defendant by plaintiff of any person or persons to whom such policies or bonds were sold was not the proximate cause of the sale of such policies or bonds; that the plaintiff was not the procuring cause of the sale of such policies or bonds; that if any agreement as alleged by plaintiff had ever existed between the parties to said cause, it was thereafter and prior to any sale of such policies or bonds, mutually rescinded and abrogated by the oral agreement of the said parties on or about the 11th day of May, 1931; that during the month of May, 1931, and prior to the sale by defendant of certain alleged combination annuity and life insurance policies in connection with which the plaintiff claims his alleged commissions, the plaintiff acted adversely to the defendant and was guilty of bad faith to the defendant in connection with said transactions, and endeavored to prevent the sale by defendant of said alleged combination annuity and life insurance policies; * * *."

It is undisputed that plaintiff introduced one George Bates

to defendant on May 11, 1931, that defendant sold to Bates, his mother and his sister certain annuity and insurance policies of the Equitable Life Assurance Society of the United States (hereinafter for convenience referred to as the Equitable) on May 29, 1931, and that defendant received $8,400 commission by reason of said sales. The evidence, however, was in sharp conflict as to the nature and terms of the alleged commission agreement between the parties and as to the alleged abrogation of said agreement. It is not substantially disputed that after the date of the alleged agreement between the parties and prior to the sale of the policies by defendant, Stein did enter into an agreement with an agency of another insurance company, under which he was to receive a commission in excess of that which he claims he is entitled to receive from Steiner, in the event that such other agency rather than Steiner sold the policies to the members of the Bates family; and that in pursuance of information furnished by plaintiff to such other agency, the latter endeavored to sell somewhat similar policies to the said members of the Bates family in competition with defendant.

Defendant contends that he promised to take care of plaintiff only in the event that Stein sold policies to some of his clients; that Stein's adverse activities constituted bad faith and disloyalty, and that when information thereof came to him May 11, 1931, he repudiated with plaintiff's consent any arrangement which the parties theretofore had with reference to commission; and that solely through his own efforts, and despite plaintiff's adverse activities, he sold the policies to the Bates family.

Plaintiff's theory is that he was a mere middleman and not either an agent or broker and that after he had introduced the "customer" to defendant he owed no duty of any kind to Steiner; and that there was no evidence in the record of adverse activities

on his part or to support plaintiff's contention that another insurance agency sought to sell insurance to the Bates family as a result of information furnished by him.

The trial court predicated its finding and judgment solely on the question that the agreement between the parties contemplated the payment of the commission claimed on the basis alone of the introduction of the purchaser by plaintiff to defendant, and, such introduction having been shown, plaintiff was entitled to recover.

Regardless of whether plaintiff was to receive as his share of defendant's commission on the sale of the policies in question one-half or a "split", or whether defendant was to take care of plaintiff, the conclusion is inescapable that plaintiff was to receive commission only in the event that he "would procure or assist in procuring the sale" of the policies.

April 30, 1931, the first day he met defendant, Stein exacted a promise from Steiner that he would not attempt to contact Bates, the prospective purchaser, before he (Stein) would even give him Bates's name. Under the admitted arrangement of the parties, defendant was precluded from seeing or talking to Bates until what Stein considered was the opportune time. It was not until May 11, 1931, that plaintiff brought Bates to defendant's office and introduced him. In the meantime, from the day he first met defendant, plaintiff, according to his own testimony, spent an average of about an hour a day for the succeeding seven or eight days with Steiner, assiduously applying himself to learn from him the advantages and outstanding features of the particular policy so that Stein might the better present its merits to Bates. From time to time plaintiff reported to Steiner the progress he was making with Bates. During this period Stein assumed the exclusive duty of interesting Bates in the purchase of policies for himself

and members of his family, and on May 7, 1931, he secured from defendant an Equitable policy for $100,000 on Bates for presentation to the prospect so that he might examine its terms. Plaintiff returned this policy a day or two later with the statement that he did not think he could sell the Equitable policy to Bates, and upon being asked why, merely said "I just won't be able to close them." Up to this point Stein had not introduced Bates to Steiner and he had himself personally assumed the entire responsibility of making the sale. Stein's conduct thus far certainly does not bear out his contention that his sole obligation under the agreement was to introduce Bates to defendant in order to earn his commission. But plaintiff's ardor in defendant's behalf had perceptibly cooled. Before introducing Bates to Steiner, Stein had contacted Marsh & McLennan, another insurance agency, which offered him a larger commission if Bates purchased policies of a similar nature issued by the Penn Mutual Life Insurance Company, which such other agency represented. Plaintiff even told defendant that he thought it would be useless to bring Bates in to meet him [Steiner], but when plaintiff was advised that, if he did not bring Bates in, defendant would go and see him, Stein finally consented to "bring him in." As heretofore stated, plaintiff introduced Bates to defendant on May 11, 1931, but immediately before doing so had taken him to the office of Marsh & McLennan. Plaintiff told defendant later the same day that he had been over to Marsh & McLennan's office to "see them" about submitting Penn Mutual Life policies to Bates. Stein testified, in effect, that defendant protested against his contact in this regard and "raised his voice a bit". Defendant testified as to this occurrence that he not only protested against plaintiff's inimical conduct but insisted that "if I sell the Equitable contracts, you are not going to get any pay from me of any kind" and

that Stein answered, "that is all right, because you can't sell the Equitable contracts; I am with Bates and I am going to sell him Penn Mutual contracts."

Defendant testified that between May 11, 1931, and May 29, 1931, when Bates purchased the Equitable policies from him on his lawyer's advice, he neither saw nor spoke to Stein. As to whether he had met or talked to defendant between May 11, 1931, and May 29, 1931, Stein's recollection was decidedly hazy. The defendant also testified that prior to May 11, 1931, plaintiff had not told him that Bates was going to examine policies of a similar nature of other companies or that he [Stein] was going to make commission arrangements with other insurance agencies.

It is clear after a careful examination and consideration of all the evidence in the record that the construction placed by plaintiff himself on his agreement with defendant for commissions, from its very inception, refutes his claim that he earned the right to share in defendant's commission merely by introducing Bates to Steiner. When he did introduce Bates to defendant he accompanied his introduction with the statement that he was a hopeless prospect and could not be sold. Prior to that time Stein had exclusively undertaken the task of procuring the sale and it is idle to urge now that his sole function under the agreement was merely as a middleman to introduce Bates to Steiner.

Plaintiff's contention in this regard is further refuted by the theory advanced in his original affidavit of claim, wherein it is averred that "plaintiff's claim is based upon an agreement by defendant to pay plaintiff a commission of $4,200 if plaintiff would procure or assist in procuring the sale of a certain annuity bond." While plaintiff's original affidavit of claim, as well as his amended affidavit of claim, was verified by one of his attorneys, that fact does not detract from the force of the admission contained therein

that these occurred, [illegible]

the [illegible] testimony [illegible]

him their mutual contract."

Defendant testified [illegible]

28, 1921, had been made [illegible]

on his lawyer's advice, [illegible]

whether he had met or talked [illegible]

and May 20, 1921, [illegible] recollection [illegible]

defendant also testified [illegible] 1921, [illegible]

had not told him that [illegible]

similar nature or other companies [illegible]

to make commission arrangements [illegible]

It is clear [illegible]

of all the evidence in the record [illegible] by

plaintiff himself on his [illegible]

from its very inception, [illegible]

to share in defendant's commission [illegible]

Steiner. [illegible]

his introduction with the [illegible]

and could not be paid. [illegible]

undertaken the task of promoting the [illegible]

now that his sole function [illegible]

middleman to introduce [illegible]

Plaintiff's contention in this regard [illegible]

the theory advanced in his original [illegible] of claim, [illegible]

is averred that defendant [illegible] upon [illegible]

defendant to pay plaintiff a commission of $6,000 [illegible]

procure or assist in procuring the [illegible]

while plaintiff's additional affidavit of claim, [illegible]

affidavit of claim, was verified by one of his [illegible]

does not detract from the force of the [illegible]

that his commission was to be earned by procuring or assisting in procuring the sale of the policies. This affidavit of claim surely was not filed until after consultation between plaintiff and his attorney and Stein must be presumed to know the contents of it. There was no showing or offer to show that the original affidavit was inadvertently or mistakenly drawn and it is fair to assume that it more truly portrays the agreement of the parties than the amended affidavit of claim filed four years later.

After plaintiff's intensive initial effort over a period of more than a week to personally sell the policies to Bates, his attitude changed and he not only did not offer any further assistance toward procuring the sale for defendant, but the evidence is convincing that his efforts thereafter were bent on depriving Steiner of such sale.

Plaintiff's insistence that he was merely a middleman, and, as such, had no other duty to perform to earn his commission than to bring about the introduction of Bates to Steiner comes with poor grace, and his position in this respect is untenable. In Ruling Case Law, vol. 4, p. 330, it is said: "A broker is simply a middleman, within the meaning of this exception, when he has no duty to perform but to bring the parties together, leaving them to negotiate and come to an agreement themselves without any aid from him. If he takes, or contracts to take, any part in the negotiations, however, he cannot be regarded as a mere middleman, no matter how slight a part it may be." To the same effect are Jenson v. Bowen, 37 N. E. 352, 164 N. Y. 4; Clopton v. Meeves, 24 Idaho 293, 133 Pac. 907; Stapp v. Godfrey, 158 Ia. 376, 139 N. W. 893. These cases hold that the status of a middleman exists only where one, not having undertaken to act as agent for either party, or to

exercise for either his skill, knowledge or influence, merely brings them together to deal for themselves, he standing indifferent between them; and that if he assists either party in effecting or negotiating the trade, or if he takes any part in the negotiations, however slight, and even though he may do so without any prior agreement so to do, he becomes a partisan agent and cannot be considered a middleman.

Plaintiff did not stand indifferent between Steiner and Bates. For the eight or nine days immediately following April 30, 1931, when he first met Steiner, plaintiff actively negotiated in defendant's behalf to sell the policy to Bates, but, thereafter, for the reasons already stated, his efforts appear to have been directed to frustrating defendant in his efforts to close the insurance contracts with the said Bates. In our opinion, the evidence does not show that plaintiff's status was that of a middleman and it was incumbent upon him to prove that it was, not only at the inception of the transaction but throughout its entire course. (Jenson v. Bowen, supra.)

Whether we denominate plaintiff's status as that of broker or agent makes no material difference. Designate his capacity what you will, from the moment Stein became interested with defendant in the sale of the equitable policies to Bates he owed his principal, Steiner, the duty of loyalty and good faith, and he was prohibited under the law from acquiring rights in the sale of the policies antagonistic to defendant, with whose interests he had become associated. In passing upon a somewhat analagous situation in Davis v. Hamlin, 108 Ill. 39, the court said at pp. 48-49:

"The subject is not comprehended within any such narrowness of view as is presented on appellant's part. In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation. Of this principle Bispham says: 'The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others,

such as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise.' (Bispham's Equity, sec. 93.) * * * The rule we apply, as to its broadness in extent, is aptly expressed in the American note to Keech v. Sandford, 1 Lead. Cases in Eq. 53, as follows: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'"

In Hafner v. Herron, 165 Ill. 242, in discussing the question of bad faith on the part of an agent or broker to his principal, the court held at p. 247:

"But it is well settled, that if an agent or broker is employed to transact a particular piece of business, and in the transaction is guilty of bad faith to his principal, he thereby forfeits his commissions. (Wharton on Law of Agency, sec. 336.) * * * In the application of this rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not; in such case, the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal. 'It matters not, that there was no fraud meant, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.' (Young v. Hughes, 32 N. J. Eq. 372.)"

The finding of the trial court, in our opinion, was not only against the manifest weight of the evidence, but was predicated upon a misconception of the law applicable to the facts in this case. We are impelled to hold that under his agreement with defendant plaintiff was required to procure or assist in procuring the sale of the policies, that the agreement was mutually rescinded May 11, 1931, when plaintiff first apprised defendant of his commission arrangement with the other insurance agency, and that in any event plaintiff by his adverse activities, ~~bad faith and disloyalty~~ forfeited any right that he may otherwise have had to share in defendant's commission.

For the reasons indicated herein the judgment of the Superior court is reversed.

REVERSED.

Friend and Scanlan, JJ., concur.

38907

42

PAUL C. LOEBER, CHARLES E. FOX and ALBERT W. SWAYNE, as trustees of the Leight Trust,

Appellees,

v.

14 WEST ELM STREET BUILDING CORPORATION, a corporation, CHICAGO TITLE & TRUST COMPANY, as trustee, PENN MUTUAL LIFE INSURANCE COMPANY, a corporation, and E. A. PECK, as trustee,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

289 I.A. 619

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Paul C. Loeber, Charles E. Fox and Albert W. Swayne, as trustees of the Leight Trust, filed a bill of complaint May 16, 1933, to foreclose their lien for $36,013.31, with interest from January 5, 1931, on account of interest coupons owned by them which were originally attached to bonds of an issue in the principal aggregate amount of $875,000, executed by the Elm Street Building Corporation and secured by its trust deed of May 5, 1927, conveying to the Chicago Title & Trust Company as trustee the property at 14 W. Elm street, Chicago. Except as to certain issues decided on the pleadings, the cause was referred to a master in chancery, who recommended that the bill be dismissed for want of equity. The chancellor sustained plaintiffs' exceptions to the master's report and entered a decree March 2, 1936, finding that plaintiffs were entitled to a lien for $14,405.28 with interest from January 5, 1931 (being 40% of the amount claimed) and directing a sale of the property in default of the payment thereof. From this decree defendants appeal. Plaintiffs filed a

notice of cross-appeal because said decree allowed only 40% of their lien claim instead of the full amount thereof.

Plaintiffs' complaint alleges that December 5, 1927, the Elm Street Building Corporation issued bonds aggregating $875,000, with interest coupons attached, payable at the office of Leight & Company, Chicago, and to secure said bonds and coupons it executed its trust deed to the Chicago Title & Trust Company as trustee (copy of trust deed attached to complaint as exhibit "A" and made a part thereof); that plaintiffs are the owners of certain interest coupons detached from the bonds of said issue, all of which interest coupons matured on and prior to December 5, 1929; that February 27, 1930, the Chicago Title & Trust Company, trustee under said trust deed, exhibited its bill of complaint in the Circuit court of Cook county in case No. B-196773, entitled Chicago Title & Trust Company as trustee v. Elm Street Building Corporation et al., for the foreclosure of the lien of said trust deed; that such proceedings were had in that cause that March 14, 1931, a decree of foreclosure was entered therein finding that the Chicago Title & Trust Company as trustee had a lien for its own benefit of $55,388.50 and for the benefit of the owners of unpaid bonds and interest coupons (exclusive of the interest coupons owned by plaintiffs) of $971,011.08; that in said decree Leight & Company, as the owner of the interest coupons heretofore referred to, was found to have a lien of $36,013.21, with interest from January 5, 1931, which lien was found to be subject and subordinate to the lien of the Chicago Title & Trust Company, in its own behalf, and on behalf of the owners of bonds and interest coupons other than those owned by Leight & Company.

Plaintiffs' complaint then set out verbatim paragraph 61 of said decree, wherein it is ordered and adjudged that defendant Elm Street Building Corporation pay to Chicago Title & Trust Company as trustee $55,388.50 for its own benefit and $971,011.08 for the

notice of cross-appeal because [illegible]
their lien claim instead of the full amount thereof.

Plaintiffs' complaint alleged that on [illegible], 1951, the

The Trust Building Corporation [illegible]
with interest coupons attached, payable at the office of Knight [illegible]
Company, Chicago, and to secure said bonds [illegible]
its trust deed to the Chicago Title & Trust Company as trustee
(copy of trust deed attached to complaint as exhibit [illegible])
a part thereof); that plaintiffs are the owners of certain interest
coupons detached from the bonds [illegible] of which interest
coupons matured on and prior to [illegible], 1949; that [illegible]
1950, the Chicago Title & Trust Company, trustee under said trust
deed, exhibited its bill of complaint in the Circuit court of Cook
county in case No. [illegible], entitled Chicago Title & Trust Company,
as trustee v. The Trust Building Corporation et al., for the fore-
closure of the lien of said trust deed; [illegible]
had in that cause that [illegible], 1951, [illegible]
entered therein [illegible]
as trustee had a lien for its own benefit of $[illegible] for the
benefit of the owners of unpaid bonds and interest coupons (exclusive
of the interest coupons owned by plaintiffs) of $[illegible]; that
said Jerome Knight & Company, as the owner of the interest coupons
heretofore referred to, [illegible]
with interest from January 1, 1951, which lien was found to be sub-
ject and subordinate to the lien of the Chicago Title & Trust Com-
pany, in its own behalf, and on behalf of the owners of [illegible]
interest coupons other than those owned by [illegible] & Company.

Plaintiffs' complaint then set out [illegible]
of said decree, wherein it is ordered [illegible]
The Trust Building Corporation pay to [illegible]
as trustee $[illegible] for its own benefit and $[illegible] for the

benefit of the holders of unpaid bonds and interest coupons with interest thereon as aforesaid, and that, unless said Elm Street Building Corporation or some one for it or one or more of the defendants should make said payments within five days, together with the costs of suit and master's fees taxed at $4,843.35, the mortgaged property described therein or so much thereof as may be sufficient to realize the amounts so found due as aforesaid with interest and costs, etc., be sold by the master.

It is further alleged that Leight & Company did not file any pleading in said cause praying for the foreclosure of the trust deed for the amount due it on account of its interest coupons and that the decree did not order payment of the amount due Leight & Company on account of the interest coupons held by it and did not direct any sale in the event of the nonpayment thereof; that the premises were sold by the master and a certificate of sale issued May 6, 1932; that by mesne conveyance the equity of redemption in said real estate became vested in the 14 West Elm Street Building Corporation, which redeemed from said sale June 14, 1932; that by virtue of said conveyance and redemption the title to said premises became and is vested in the 14 West Elm Street Building Corporation and the lien of the aforesaid trust deed as security for the interest coupons formerly owned by Leight & Company and now owned by plaintiffs has been reinstated and constitutes a first and paramount lien on the premises; that the rights of all other persons are subordinate and that there is due plaintiffs $36,013.21 on account of said interest coupons and interest thereon from January 5, 1931, as found by said decree; and that the aforesaid trust deed provides inter alia:

"So long as said defaulted bonds or interest coupons remain unpaid, said Leight & Company, as such holder of such defaulted bonds or interest coupons, may assert and enforce (but subject to the continuing prior lien of this Trust Deed as to all other unpaid bonds or coupons) all the rights, privileges and remedies given by this trust deed or by law, to the owners or holders of such defaulted bonds or interest coupons, including the right to cause this trust

[illegible] of the [illegible] in [illegible] and interest thereon as aforesaid, and that, under [illegible] building [illegible] or more of the defendants should [illegible] with the [illegible] mortgaged property [illegible] sum sufficient to satisfy the amount, [illegible] interest and costs, [illegible] by the mortgage.

It is further alleged that [illegible] any pleading in said cause [illegible] deed for the [illegible] that the deed not [illegible] Company on account of the [illegible] direct any suit in [illegible] premises were sold by the [illegible] May 6, 1932; that by [illegible] said real estate [illegible] Corporation, which [illegible] virtue of said [illegible] became and is vested in [illegible] and the title of the aforesaid trust deed as security for the [illegible] coupons formerly owned by [illegible] title and interest [illegible] on the premises; that the rights of all other [illegible] and that there is due plaintiffs [illegible] on account of said interest coupons and interest thereon from January 6, 1931, as [illegible] said decree; and that the aforesaid trust deed provides [illegible]:

"So long as said defaulted bond or interest coupons remain unpaid, said trustee or company, at their option [illegible] bonds or interest coupons, may assert and enforce [illegible] the continuing prior lien of this trust deed [illegible] or coupons) all the rights, powers and remedies given by this trust deed or by law, to the owner [illegible] of such defaulted bonds or interest coupons, including the right to [illegible] this trust

deed to be foreclosed in accordance with its terms, and said premises to be sold for the payment and satisfaction of such defaulted bonds or interest coupons * * * The rights and privileges given to said Leight & Company by the provisions of this Article, or in any other part of this trust deed, shall inure to the benefit of its successors and assigns. * * *

"All rights of action under this Trust Deed or under any bonds or coupons secured hereby may be enforced by the Trustee or Leight & Company, in its discretion. * * *"

It is also alleged that the balance of the indebtedness due under the trust deed has been fully paid, that the amount due plaintiffs is the only outstanding indebtedness thereunder and that the rights of the Penn Mutual Life Insurance Company as the owner of the mortgage indebtedness of $120,000 secured by the trust deed executed April 15, 1932, on the premises involved are subordinate to plaintiffs' rights.

The answer and the various amendments thereto filed by defendant 14 West Elm Street Building Corporation were adopted by each of the other defendants and may be treated as the joint and several answers of all the defendants. Defendant's answer to the bill of complaint admits substantially all matters of fact therein set forth, but denies that plaintiffs have any lien or right to foreclose for the reason that the trust deed in question and all indebtedness thereby secured, including the interest coupons owned by Leight & Company, was fully and completely foreclosed in said former foreclosure suit No. B-196773; that by the decree of foreclosure and sale entered therein it was the intention of the court to order and direct, and said decree when properly construed does order and direct, the sale of the mortgaged premises for the satisfaction of all the several amounts in said decree found to be due and owing to the several persons therein found to be entitled to liens against said premises, including the amount of $36,013.21 found due to Leight & Company as the owners of the interest coupons now sought to be foreclosed.

By an amendment filed herein July 26, 1933, the foreclosure decree in case No. B-196773 was incorporated in its entirety in defendants' answer. Another amendment to the answer was filed December 12, 1933, which avers substantially that Leight & Company, plaintiffs' predecessor in interest, was the so-called house of issue for said $875,000 of bonds and sold them to the public, and that such bonds with their attached interest coupons thereby came into the hands of various persons; that the office of Leight & Company was designated in said bonds and coupons as the place where the coupons were to be presented for payment; that when the interest coupons now sought to be foreclosed became due they were duly presented for payment at the office of Leight & Company by the various owners thereof, who were paid the face amount of their respective coupons, which were surrendered to and taken up by Leight & Company as in the ordinary course of its business; that neither the mortgagor nor any one for it furnished to Leight & Company the money used by it for payment of such interest coupons, but that the mortgagor was then in default in that it had failed to deposit with Leight & Company the moneys required for payment of said interest coupons, and the moneys so used were the moneys of Leight & Company and were paid and used by it "without informing said respective owners and holders of such coupons of the fact that said mortgagor had so defaulted or of the fact that the moneys so being paid were the moneys of Leight & Company, or that Leight & Company intended to hold said coupons so surrendered to it uncancelled and claim ownership thereof and the lien thereunder upon the mortgage security, or of any fact or thing calculated to advise or put said owners and holders upon notice that Leight & Company then and thereby intended to exercise any right to purchase said coupons, or intended by payment of said moneys to said coupon holders to do or accomplish anything other or more than pay-

ment of the interest so due; and this defendant further says that said holders and owners of said coupons had, nor had any of them, any such knowledge or notice at the time of receiving the moneys so purporting to be offered in payment of interest;" that the coupons now sought to be foreclosed were therefore fully paid and discharged and the lien thereof under the terms of said trust deed was terminated and released at the time of the respective maturities of said coupons; that plaintiffs participated and co-operated in the plan of reorganization of the mortgaged property formulated by the committee of bondholders, which plan did not provide for or contemplate the making of any payment or allowance of any lien on account of said interest coupons then owned by plaintiffs but did contemplate that through the operation of said plan the bondholders would become owners of said mortgaged property, subject only to the lien of the new mortgage of $120,000 to be made and negotiated as a part of said plan; that plaintiffs, by their co-operation and participation in the reorganization plan, induced approximately 99% of the bondholders to join in said plan and surrender their superior rights; that the redemption, by virtue of which plaintiffs claim that their subordinate lien was elevated to a prior position, was made as a part of said plan, and that even if plaintiffs did in fact have a lien upon the mortgaged real estate by virtue of paying and taking up the interest coupons in the manner described, and even if such lien was not barred and foreclosed by the proceedings had in the former foreclosure case No. B-196773, nevertheless plaintiffs are estopped by their acts and conduct from now asserting any such lien against the said real estate, which is equitably the property of said bondholders.

A further amendment to defendants' answer was filed June 8, 1934, which set forth in full a written memorandum of agreement executed May 7, 1931, by the attorneys for plaintiffs and the

Bondholders Protective Committee, which agreement provided for the co-operation of said parties in the matter of the formulation, submission to bondholders and carrying out of plans of reorganization of the various properties covered by bond issues which Leight & Company had sold to the public.

Plaintiffs and defendants agree that the decree of foreclosure entered in the instant case ordering the sale of the premises involved to satisfy plaintiffs' lien to the extent of 40% of their claim is erroneous, and declare that such decree can only be reconciled with the theory that the trial court endeavored to compromise the issues on the basis of the written memorandum of the attorneys for the parties of May 7, 1931, which provided that "where the plan of reorganization contemplates only one class of securities to be issued to all interests" the par value of plaintiffs' subordinated interest coupons "shall be scaled down to 40% of said par value and securities of the same class issued to other bondholders and on the same basis will be issued to the Leight trustees, equivalent to such scaled down value." The theory of the court was clearly erroneous in that if such written memorandum was effective and binding between the parties, it converted any right to a lien which plaintiffs may have had by virtue of their subordinated interest coupons into a right merely to participate beneficially in the stock of the new corporation formed pursuant to the 14 West Elm Street reorganization plan on the basis of 40% of the interest they would be entitled to receive had their coupons not been subordinate. No alternative right to a lien to the extent of 40% of their interest coupons or in any other amount was preserved to the Leight trustees in this instrument and it necessarily follows that no such right can be predicated upon it.

With a single exception, concerning which there was a conflict in the evidence and will be referred to later, the facts in this

proceeding are uncontroverted, and, as stipulated by the parties before the master, appear in substantially the following chronological order:

In 1927 Leight & Company, a corporation, had its office in Chicago and was engaged in the business of underwriting and selling various issues of securities to the public. It sold 1,508 bonds issued under date of May 5, 1927, in the aggregate amount of $875,000, executed by the Elm Street Building Corporation for the purpose of constructing a large apartment hotel building on the property at 14 West Elm street, Chicago. This bond issue was secured by a trust deed of said property by the Elm Street Building Corporation to Chicago Title & Trust Company as trustee. Under the terms of the bonds and interest coupons and the trust deed securing them, such bonds and interest coupons were payable at the office of Leight & Company and there were provisions in the trust deed to the effect that if the mortgagor should default in furnishing the money for the payment of the bonds and interest coupons when due, then that:

"Leight & Company may at maturity or at any time within sixty (60) days after such default pay out of its individual funds to the holder or holders of such defaulted bonds or coupons the amount due thereon, and such bonds or interest coupons shall thereupon be deemed to have been purchased by said Leight & Company, and such bonds or interest coupons shall be delivered uncanceled to Leight & Company, and shall become and be the property of said Leight & Company. The payment for such defaulted bonds or interest coupons as aforesaid by said Leight & Company shall not be considered a voluntary payment by it for the benefit of the party of the first part or for the benefit of any of the other holders of bonds or interest coupons secured thereby, and shall not have the effect to pay or retire the said bonds or interest coupons so purchased by it, nor to impair the security given by this Trust Deed for the payment thereof, except as hereinafter provided but shall vest said Leight & Company with all the rights, liens and privileges (except as hereinafter provided) given to or conferred upon the former owners or holders of such defaulted bonds or interest coupons."

Further provisions of the trust deed gave Leight & Company, in the event it advanced the money for such defaulted bonds or interest coupons, the right to elect within ninety days as to

proceeding [illegible] unconstitutional, [illegible] by [illegible] before the [illegible] chrono-logical order:

In 1894 Knight & Company, [illegible] Chicago and was engaged in the [illegible] various issues of [illegible] to the public. [illegible] 1,500 bonds issued under date of [illegible], 1894, in the aggregate amount of $275,000, executed by the [illegible] for the purpose of constructing a [illegible] on the property at 14 [illegible] Street, Chicago. This [illegible] by a trust deed of said property by the [illegible] poration to Chicago Title [illegible] terms of the bonds and interest coupons [illegible] them, such bonds and interest coupons [illegible] of Knight & Company and there [illegible] the effect that if the mortgagor [illegible] money for the payment of [illegible] then that:

> "Knight & Company may [illegible] sixty (60) days after [illegible] to the holder or holders of such [illegible] amount due thereon, [illegible] thereupon be deemed to have been purchased by [illegible] and such bonds or interest coupons shall be [illegible] Knight & Company, [illegible] Knight & Company, [illegible] coupons so [illegible] by said Knight & Company shall not be [illegible] ered a voluntary payment by [illegible] the first part or for the benefit of [illegible] bonds or interest coupons [illegible] effect to pay or retire the said bonds or interest coupons [illegible] purchased by it, [illegible] deed for the payment thereof, [illegible] shall vest said Knight & Company with all the rights, [illegible] privileges (except [illegible]) [illegible] upon the former owner or holders of such [illegible] interest coupons."

Further provisions [illegible] in the event it advanced the money for [illegible] interest coupons, [illegible] within ninety days [illegible]

whether it would hold them on a parity with other bonds, and in the event it did not so elect then the bonds or coupons so acquired were to be held by it as subordinate to all other bonds and interest coupons of the issue. The mortgagor, Elm Street Building Corporation, failed to provide sufficient funds for payment of the interest coupons which matured June 5, 1928, December 5, 1928, June 5, 1929, and December 5, 1929, and Leight & Company, on or about the dates of the several maturities of said interest coupons, took the interest coupons now sought to be foreclosed in over its counter in the ordinary course of business in the same manner as though it were paying the interest then due as evidenced by such coupons, but used its own money for such payments without advising the various holders of the respective coupons that the mortgagor had defaulted and that it was paying its own money and acquiring ownership of the coupons in the manner provided in the trust deed. So far as the holders of the coupons knew or were advised Leight & Company was merely paying the mortgagor's money out for interest.

February 27, 1930, by reason of the mortgagor's various defaults, the Chicago Title & Trust Company, trustee under the trust deed, filed its complaint in the circuit court in case No. B-196773 for the foreclosure thereof and made Leight & Company a party defendant under the style "unknown owner". It was duly served with process. In that proceeding Leight & Company produced and placed in evidence the interest coupons which it had acquired, as heretofore shown, but did not file any pleading in that cause which proceeded to a decree of foreclosure entered March 14, 1931. Prior to the entry of the decree in case No. B-196773 Leight & Company was in process of liquidation and plaintiffs herein as trustees under a trust agreement dated December 23, 1930, forming the Leight trust, acquired the assets of that company, including the coupons now sought

to be foreclosed and any rights based thereon under said decree. A committee for the protection of the holders of first mortgage bonds sold through Leight & Company had also been formed and was active in connection with various defaulted bond issues, including the issue here in question secured by the property at 14 West Elm street.

The Leight trustees had possession of the records formerly owned by Leight & Company relative to the various bond issues sold by it, including the respective lists of bondholders, and were active in the reorganization of the properties covered by said bond issues. Their interest and activity are manifested by the written memorandum of agreement, heretofore referred to, executed by the attorneys for the said Leight trustees and the Bondholders Protective Committee May 7, 1931. This memorandum contains recitals as to the desirability of co-operation between the parties in the matter of reorganizations and in formulating and working out the plans therefor. It provides "that in all instances plans will be sent out with the joint approval of the Leight trustees and the committee and that there shall be an indication in connection therewith whether the plan originates with the Leight trustees or the committee. Except for this indication as to the origin of the plan and the joint letter with reference thereto, the whole plan is to be handled under the direction of the originating party, whether the Leight trustees or committee, until the whole matter is completed." It also provides as to reorganization plans promulgated by the committee that "it is agreed that in such a case the committee shall receive 75% of such reorganization fee and the Leight trust 25%," that "where the plan of reorganization contemplates only one class of securities to be issued to all interests" the par value of plaintiffs' subordinated interest coupons "shall be scaled down to 40% of said par value and

to be formulated and by eighth Duke of Devonshire, Hall [illegible],
A committee for the protection of the rights of [illegible]
hands held through Knight's Commission had been formed and was
active in connection with various disturbed areas [illegible], including
the lands held in question [illegible] by the property as [illegible]
[illegible].

The Knight brothers had petitioned on the [illegible] formally
owned by Knight's company relative to the [illegible] land
by it, including the respective lists of [illegible], [illegible]
active in the reorganization of the property [illegible] by [illegible]
issues. Their interest and reality are [illegible] by the [illegible]
memorandum of agreement, [illegible] by the
attorneys for the said Knight brothers [illegible]
Commission May 7, 1921. This memorandum [illegible] to the
desirability of co-operation between the [illegible] in the matter of
investigations and in formulating and [illegible] the plan [illegible]
for. It provides that in all [illegible] the joint approval of the Knight brothers and [illegible]
shall be an limitation in connection [illegible]
plan [illegible]
for this indication to be the origin of the plan and the joint [illegible]
with [illegible] the whole plan [illegible] the
direction of the organizing power, [illegible] committee on
committee, until the whole matter is completed. It also provides
as to reorganization plans promulgated by the commission that "it is
agreed that in such case the conditions which [illegible] VII of such
reorganization [illegible] and the Knight [illegible]" [illegible]
of reorganization consummated only one class of [illegible] be
issued to all interests" the par value of [illegible]
interest coupons "shall be scaled down to [illegible]

securities of the same class issued to other bondholders and on the same basis will be issued to the Leight trustees equivalent to such scaled down value;" and that where the plan of reorganization calls for a "continuing committee or trustees * * * the Managing Trustee of the Leight Trust" is to be a member of such committee or one of such trustees. No sale was had pursuant to the foreclosure decree entered in case No. B-196773 until May 6, 1932, over a year subsequent to the entry of that decree. In the meanwhile the Bondholders Protective Committee had formulated a proposed plan of reorganization of the property, which in typewritten form was transmitted by the attorneys for said committee to Paul C. Loeber, the managing trustee of the Leight trust, by letter dated April 8, 1932. The letter, for which Loeber receipted, requested his approval of the plan submitted.

The only conflict as to the facts arises at this point. Mrs. Cleveland, an attorney in the office of the attorneys for the committee, who wrote the letter to Loeber, testified that after she had sent the proposed plan to him she telephoned him and he told her that he did not have time to go over the plan personally, but that he would send Mr. Tegtmeier, an attorney in his office, to discuss said plan with her and that anything Tegtmeier did in the matter was satisfactory to him [Loeber]; that Tegtmeier came to her office, and, after some discussion, stated that the plan was acceptable and agreed that the approval of the Leight trust be printed on same; and that she thereupon arranged for the printing of the plan as finally drafted with the approval of the Leight trust thereon. Tegtmeier testified that he went to Mrs. Cleveland's office, discussed the plan with her at Loeber's direction and made certain objections to it, but that he told her that he would have to report back to Loeber; that he never at any time

securities of the same class issued to other bondholders, or on the same basis will be issued to the [illegible] trustee, [illegible] to such so-called cash [illegible] that the plan of reorganization calls for a "constituting committee or trustees" [illegible] the managing Trustee of the Knight Trust [illegible] to be a member of that committee or one of such trustees. [illegible] the foreclosure decree entered [illegible] until May 9, 1932, over a year subsequent to the entry of that decree. In the meanwhile the bondholders protective committee had submitted a proposed plan of reorganization of the property, which in typewritten form was submitted by [illegible] for the committee to Emil C. Loeber, the managing trustee of the Knight Trust, by letter dated April 8, 1932. The letter, [illegible] re-ceipted, requested his approval of the plan submitted.

The only conflict as to [illegible] taken at this point, Mrs. Cleveland, an attorney in the office of the attorney for the committee, who wrote the letter to Loeber, testified that after she had sent the proposed plan to him she telephoned him and he told her that he did not have time to go over the plan personally, but that he would send Mr. Tegtmeier, an attorney in his office, to discuss said plan with her and that anything Tegtmeier did in the matter was satisfactory to him personally; that Tegtmeier came to her office, and, after some discussion, stated that the plan was acceptable and agreed that the approval of the Knight Trust be written on same, and that the Lineage [illegible] of the plan as finally drafted with the approval of the Knight Trust thereon. Tegtmeier testified that he went to Mrs. Cleveland's office, discussed the plan with her at Loeber's direction and made certain objections to it, but that he told her that he would have to report back to Loeber; that he never at any time

approved the plan in the name of Loeber or the Leight trust; and that "Mr. Loeber did not even authorize me to approve the plan in his name. He said, 'go over and find out what it is about and report back and say nothing.'"

The four page printed plan was mailed to the bondholders by the bondholders committee on April 13, 1932. At the end of the plan appeared the approval of the Bondholders Protective committee by its chairman, Adolph Kempner, and beneath it the approval of the Leight Trust as contained in the following printed addendum:

"Leight Trust, 111 West Washington Street, Chicago, Ill.

The Leight Trustees approve the plan of reorganization above set forth and recommend the immediate deposit of the First Mortgage Bonds with the above named Depositaries.

Paul C. Loeber,
Managing Trustee."

On the same date a copy of such printed plan was mailed to the Leight Trust, which appeared on the list of bondholders. April 23, 1932, a follow-up letter to the bondholders was drafted by Mrs. Cleveland for the bondholders committee and a copy sent to Loeber, enclosed with the following letter:

"We are sending out a follow-up letter on the 14 West Elm Street matter, as we desire to have as many bonds deposited as can be before the sale, which is to be held on May 6th. Please sign a duplicate copy of this letter as a receipt for the letter to the holders of non-deposited First Mortgage Serial 6 1/2% Gold Bonds of the Elm Street Building Corporation, dated April 23, 1932."

The follow-up letter bore the approval of the Leight trustees in the same manner and form as did the printed reorganization plan. It does not appear that Loeber objected to either of these letters to the bondholders bearing said printed indorsements on behalf of the Leight Trust, but on the contrary the Leight trustees permitted the plan of reorganization to be carried out without protesting that the use of their name was unauthorized. They actively participated in the consummation of the plan by receiving a check from the new

approved the plan in the spirit of acting on the plan [illegible]; and that "Mr. Lambert did not even [illegible] in [illegible] and plan in his name. He said, 'go over [illegible] report back and say nothing.'"

The four page printed plan [illegible] by the bondholders committee on April 15, 1933. [illegible] the plan appears the approval of the bondholders committee [illegible] approval of the Delphi Trust [illegible] in the bondholder-printed advertisement:

"Delphi Trust, [illegible]

The Delphi Trustees endorse the plan of reorganization above set forth and recommend the immediate deposits of the first Mortgage Bonds with the above named depositaries.

[illegible]

On the same date a copy of such printed plan was mailed to the Delphi Trust, which appeared on the list of bondholders. April 20, 1933, a follow-up letter to the bondholders was written by Mr. Cleveland for the bondholders committee and a copy was to "order" enclosed with the following letter:

"We are mailing out a follow-up letter on the 1st mortgage matter, as we desire to have [illegible] before the sale, which is to be held on May 9th. [illegible] a duplicate copy of this letter as [illegible] to the holders of non-deposited first mortgage [illegible] of the Delphi Trust."

The follow-up letter here referred to [illegible] Bondholders and from so did the printed reorganization plan. It does not appear that letter objected to either of these letters to the bondholders bearing the printed information on behalf of the Delphi Trust, but on the contrary the Delphi Trustees permitted the plan of reorganization to be carried out without protesting that the use of their name was unauthorized. They received notification of the consummation of the plan by receiving a check from the

corporation, the 14 West Elm Street Building Corporation, formed pursuant to the plan, in the sum of $4,375 in payment of the item "Leight Trust expense allocated to this building" as set forth in Exhibit "A" of the printed plan, and Loeber, the managing trustee of the Leight Trust, accepted office as one of the trustees under the trust agreement to hold the capital stock of the 14 West Elm Street Building Corporation, as provided in said plan.

The plan was comprised in a four-page printed letter on the letterhead of the Bondholders Protective Committee dated April 12, 1932, advising the bondholders that the committee had formulated a feasible plan for reorganization of the property at 14 West Elm street. It recited the fact that a foreclosure suit had theretofore been instituted and a final decree entered therein, and proposed as a plan of reorganization that a new building corporation be organized to which the equity in the land would be conveyed, and that the new corporation would issue its entire capital stock to three trustees under a form of trust agreement substantially like the trust agreement adopted by the committee in other Leight Company reorganizations; that "the Trustees will issue to each holder of unsubordinated first mortgage bonds who has deposited his bonds with the committee within the time hereinafter specified, a trust certificate representing a beneficial interest in one share of stock in the new corporation for each $10 in par value of unsubordinated bonds and coupons deposited with the committee by such bondholders, excluding, however, coupons maturing after December 5, 1929." It set forth that the trustees of such stock "will be three in number, two of whom will represent the bondholders and one of whom will be the managing trustee of the Leight Trust." It advised the bondholders that the committee had reasonable assurance of being able to make a new loan in an amount sufficient to carry out the plan; and that this new loan "will be secured by a first mortgage lien on the property."

corporation, [illegible] and the [illegible], [illegible] pursuant to the plan, in the name of [illegible] of the [illegible] "Leight Trust [illegible] to [illegible] in Exhibit "A" of the [illegible] plan, [illegible], the managing trustee of the Leight Trust, accepted office as one of the trustees under the trust agreement to hold the capital stock of the [illegible] West Elm Street Building Corporation, as mentioned in said plan.

The plan was communicated in a [illegible]-page printed letter on the letterhead of the bondholders protective committee dated April 12, 1933, advising the bondholders that the committee had formulated a feasible plan for reorganization of the property at [illegible] West Elm street. It recited the fact that foreclosure suit had theretofore been instituted and a final decree entered therein, and proposed as a plan of reorganization that a new building corporation be organized to which the [illegible] in the land could be conveyed, and that the new corporation would issue its entire capital stock to three trustees under a form of trust agreement substantially like the trust agreement adopted by the committee in this Leight company reorganization; that the trustees will issue to each holder of unsubordinated first mortgage bonds who had deposited his bonds with the committee within the time hereinafter specified, a trust certificate representing a beneficial interest in one share of stock in the new corporation for each $10 in par value of unsubordinated bonds and coupons deposited with the committee by such bondholders, excluding, however, coupons maturing after December 1, 1931." It set forth that the trustees of such stock will be three in number, two of whom will represent the bondholders and one of them will be the managing trustee of the Leight Trust." It advised the bondholders that the committee had [illegible] of being able to [illegible] a new loan in an amount sufficient to carry out the plan; and that this new loan "will be secured by a first mortgage lien on the property."

It further recited "in conclusion, the Committee desires to emphasize the fact that upon the consummation of this plan of reorganization the bondholders who have deposited their bonds with the Committee will, through their trust certificates, be the sole owners of the entire property, subject only to the new first mortgage loan."

The plan made no provision for the payment of the Leight & Company interest coupons or for the issuance of any beneficial interest or stock in the new building corporation to the Leight trustees in lieu thereof. The plan was approved by approximately 99% of the bondholders, who became the beneficial owners of the stock of the new corporation. It was consummated and carried out substantially as outlined to the bondholders. The new 14 West ~~Elm Street~~ Elm Street Building Corporation was formed. Its stock was issued to three trustees, one of whom was Loeber, the managing trustee of the Leight Trust, and these trustees issued the certificates of beneficial interest in said stock to all holders of unsubordinated bonds and coupons who had assented to the plan. The new corporation, as contemplated by the plan, acquired title to the real estate and negotiated a new loan of $120,000 from the Penn Mutual Life Insurance Company on notes aggregating that amount secured by a trust deed, dated April 15, 1932, from the 14 West Elm Street Building Corporation. The proceeds of this loan were used in meeting the expenses of reorganization as itemized in Exhibit "A" of the printed plan sent to the bondholders. The 14 West Elm Street Building Corporation having acquired the equity, redemption was made by it from the foreclosure sale, which had been held May 6, 1932, when the property was sold to Fred W. Heide, a nominee of the bondholders.

It was not until approximately one year after the rights and interests of the bondholders, the new corporation, the new

It further recited "in substance", that bondholders wishing to participate in the fund distribution by commencement of their plan of reorganization, the bondholders who have deposited their bonds with the committee (all, through their name or nominee, be the sole owners of the bonds involved), only as well as the non [illegible] (sic).

The plan made no provision for the payment of the Twelfth & Company interest coupons or for the payment of any preferential interests or claims in the new building corporation to the Twelfth Interests in Lien Interest. The plan was approved by approximately 99% of the bondholders. The Twelfth Bondholdings owning of the stock of the new corporation. It was [illegible] and carried out substantially as outlined to the bondholders. [illegible] XXXXXXXXXXXXXXX The Lincoln Building Corporation Lincoln. The stock was issued to three trustees, one of whom was Twelfth, the managing trustee of the Twelfth Street, and three trustees issued the certificates of beneficial interest in exchange to the holders of reorganization bonds and coupons the land, therefor, to the plan. The new corporation, as contemplated by the plan, conveyed title to the real estate and negotiated a new loan of $[illegible] from the Lincoln Mutual Life Insurance Company on notes aggregating that amount secured by a trust deed, dated April 1[illegible], 1[illegible], from the 11 [illegible] Twelfth Building Corporation. The proceeds of this loan were used in meeting the expense of reorganization in liquidation in Exhibit "A" of the printed plan sent to the bondholders. The 14 West 11th Street Building Corporation having completed the original redemption was made by it from the foreclosure sale, which had [illegible] May 6, 1932, when the property was sold to Lincoln, a nominee of the bondholders.

It was not until approximately one year after the rights and interests of the bondholders, the new corporation, the new

mortgagee and all others concerned had been determined, pursuant to the consummated reorganization plan, that plaintiffs attempted to assert any adverse rights based upon the interest coupons which they had acquired from Leight & Company or upon the subordinate lien in favor of Leight & Company found and adjudged in the decree entered in case No. B-196773.

Defendants claim that the subordinate lien which the decree of the Circuit court of March 14, 1931, in case No. B-196773 found Leight & Company was entitled to under the trust deed, was exhausted by the foreclosure sale under that decree, and that said lien was not thereafter revived by the redemption from said sale. It is sufficient answer to this contention to say that such decree specifically directed the sale of the premises in question for the purpose of satisfying ~~xxx~~ only the indebtedness due the Chicago Title & Trust Company, plaintiff in that cause, as trustee, for its own use and benefit and for the benefit of the owners and holders of bonds and interest coupons, excluding from such benefit the amount due to Leight & Company upon its subordinated interest coupons. It is admitted that the decree in the original foreclosure proceeding would have been erroneous if it had directed a sale upon failure to pay Leight & Company or the Cosmopolitan State Bank, as the junior mortgagee, or the Derby Steam Laundry Company, as a judgment creditor, the amounts found to be due them, respectively, and for which it was found they each had a valid subordinate lien, since neither of said parties filed any pleading asking affirmative relief. All that they were entitled to was to share in the surplus proceeds of the sale, if any. The decree in case No. B-196773 provided for the sale of the property and the distribution of the proceeds of such sale and was sufficient for the purpose of ordering a sale of the property free and clear of all liens, subsequent and subordinate to the lien securing the unsubordinated bonds and interest coupons.

[illegible] and all [illegible] (assumed)
to the permanent organization plan. Mr. [illegible] attempted
to assert any adverse rights that upon the intervening mortgagees
they had acquired from [illegible] company or upon the subordinate
lien in favor of [illegible] company from and including in the course
entered in case No. B-18077.

Undersigned claims that the subordinate lien which the course
of the Circuit Court of March 14, 1922, in case No. B-18077 found
Light & Company was entitled to assert the trust deed, as amended
by the foreclosure sale under that decree, was that said lien was
not thereafter revived by the confirmation thereof sale. It is
sufficient answer to this contention to say that such course equal-
ifically directed the sale of the premises in question for the pur-
pose of satisfying only the indebtedness of the Chicago Title
& Trust Company, plaintiff in that course, as trustee, for the use
use and benefit and for the benefit of the owners and holders of
bonds and interest coupons, excluding from such benefit the amount
due to Light & Company upon its subordinated interest coupons. It
is admitted that the course in the original foreclosure proceeding
would have been erroneous if it had directed a sale upon failure
to pay Light & Company or the Consolidation Electric Co., the
junior mortgagee, or any other lienor [illegible]
creditor, the amounts found to be due them, respectively, and for
which it was found by such had a valid subordinate lien, where
neither of said parties filed any pleading [illegible] affirmative relief.
All that they were entitled to was to share in the surplus proceeds
of the sale, if any. The course in case No. B-18077 provided for
the sale of the property on the distribution of the proceeds of
such sale and was sufficient for the purpose of [illegible] title of
the property free and clear of all liens, encumbrance and subordinate
to the lien securing the subordinate bonds and interest coupons,

The purchaser at the sale acquired the right to obtain a master's deed at the expiration of the redemption period, free and clear of such liens, and would have so acquired the property if redemption by the grantee of the mortgagor had not intervened, reinstating all the liens as charges against the premises in the order of priority set out in the decree, except the lien of the unsubordinated bonds and interest coupons, which was foreclosed.

In Hack v. Snow, 338 Ill. 28, where redemption of property after foreclosure sale, under analagous circumstances, was held to have reinstated the subordinate lien of a judgment creditor, the court said at pp. 31-32:

"It is claimed by defendant in error that the sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party, and she cites authorities to that effect. This, of course, is true where the decree orders the payment of all the liens and a sale is ordered for all such liens, the sale made, a certificate of purchase issued, no redemption made and deed issued. In that case, no redemption having been made, all the title which the mortgagor had at the time of the making of the mortgage, and all liens subsequent to the making of the mortgage, are wiped out and the purchaser takes the fee in the property unencumbered of such liens. In the instant case the decree did not order Liesik's judgment paid nor order the sale of the property for the payment thereof. The property was redeemed, and by virtue of the statute the mortgage, its foreclosure, the sale and the certificate of purchase become null and void and the property freed from the lien thereof but subject to Liesik's judgment lien. Liesik having a valid judgment lien upon the property was entitled to have the property sold in satisfaction thereof."

It is clear from the language of this opinion that unless a decree foreclosing a prior lien contains an unequivocal provision that the property be sold to satisfy a particular junior lien, then upon redemption such junior lien is revived and can be enforced to the same extent as if foreclosure had not been had.

It is next claimed by defendants that Leight & Company, by reason of the advancement of money to pay the interest coupons in question, did not acquire under the circumstances surrounding these transactions such ownership of or interest in said coupons as entitled plaintiffs, its successors, to maintain this foreclosure suit.

[illegible] acquire the right to obtain a mechanic's lien on [illegible] of the [illegible] lien, [illegible] of such lien, and hence [illegible] no [illegible] property is not subject to the [illegible] of the [illegible] lien, [illegible] by the [illegible] of the [illegible] lien [illegible] subordinate, [illegible] the lien on [illegible] the [illegible] in the order of priority set out in the decree. [illegible] lien or [illegible] and interest company, [illegible] foreclosure.

In Hook v. [illegible], 366 Ill. 58, where [illegible] of [illegible] lien foreclosure suit, under [illegible] lien to have [illegible] the [illegible] of a [illegible] lien, the court said as [illegible]:

"It is claimed by [illegible] that a lien for [illegible] of land under a decree of foreclosure [illegible] lien of a [illegible] land belonging to [illegible] from every lien or [illegible] effect. This, of course, is [illegible] payment of all the liens [illegible] the main [illegible] made and [illegible] made, all the title which [illegible] morning of the month, and all liens [illegible] the month, are wiped out and the purchaser [illegible] property [illegible] decree did not order [illegible] property for the [illegible] and by virtue of the [illegible] sale and has certificate of purchase [illegible] property free from the lien [illegible] ment lien. Hooks having a valid [illegible] was entitled to have the property held [illegible]."

It is clear from the language of this quotation that [illegible] foreclosing a junior lien [illegible] properly be made to satisfy a prior lien [illegible] judgment such junior lien is revived and [illegible] to the same extent as if [illegible].

It is [illegible] reason of the advancement of money to pay the [illegible] judgment, did not [illegible] lien [illegible] transactions such [illegible] clearly [illegible] the [illegible].

Specific provisions of the trust deed, heretofore set forth, declare that in the event Leight & Company advanced its own funds to the owners and holders of interest coupons in payment thereof on or after date of their maturity, it was not a mere volunteer but a purchaser of said coupons, and that in the event of the failure of Leight & Company to give the required notice of its election to hold such interest coupons upon a parity with all other bonds and interest coupons secured by said trust deed, they then became a subordinate lien upon the premises. The trust deed was a valid contract between the mortgagor, the trustee, the bondholders and Leight & Company, and every owner and holder of bonds and coupons secured by the trust deed, as well as the mortgagor, is bound by its terms, including the definite provision therein that the interest coupons in question should remain alive and uncancelled, and that the payment of the coupons in question by Leight & Company "shall not be considered a voluntary payment." If plaintiffs were claiming that their interest coupons were held on a parity with the bonds and other coupons of the issue, a different question would be presented. Then the first mortgage bondholders would be entitled to notice that coupons were being so held uncancelled because of the possibility that their security might be impaired by such a practice. What possible difference could it make to a bondholder whether or not the coupons at the time they matured and were paid by Leight & Company were actually cancelled or held in a subordinate position? In either event the prior lien of the bondholders could not be adversely affected. Plaintiffs, in our opinion, did acquire ownership of said coupons and are entitled to maintain this foreclosure proceeding unless estopped by their conduct from so doing.

The next question presented for our determination is, even though Leight & Company did acquire ownership of the interest coupons and even though such coupons were not foreclosed in case No. B-196773,

specific provisions of the trust deed, hereinbefore [illegible] [illegible], it is clear that in the event [illegible] the Trust Company advanced its own funds to the owners and holders of interest coupons in payment thereof at or after date of their maturity, it did not become a volunteer and a purchaser of said coupons, and that the failure of Dwight & Company to give the required notice of its election to [illegible] such interests [illegible] [illegible] [illegible] bonds and interest coupons secured by said trust deed, they then became a subordinate lien upon the premises. The trust deed was a valid contract between the mortgagor, the trustee, the bondholders and Dwight & Company, and every owner and holder of bonds and interest coupons secured by the trust deed, as well as the mortgagor, is bound by its terms, including the definite provision therein that the interest coupons in question though [illegible] [illegible] [illegible] [illegible], and that the payment of the coupons in question by Dwight & Company should not be considered a voluntary payment. If in the case at bar, these interest coupons were held on a parity with the bonds and other coupons of the issue, [illegible] such provision would be pointless. Then the first mortgage bondholders would be entitled to assume that coupons were being so held, unmindful [illegible] of the possibility that their security might be impaired by such a procedure. What possible difference could it make to a bondholder whether or not the coupons at the time they matured and were paid by Dwight & Company were actually cancelled or held in a subordinate position? In either event the prior lien of the bondholders could not be adversely affected. Plaintiffs, in our opinion, did acquire ownership of said coupons and are entitled to maintain this foreclosure proceeding unless estopped by their conduct from so doing.

The next question presented for our determination is, even though Dwight & Company did legally [illegible], or an [illegible] [illegible] and even though such coupons were not foreclosed in case No. B-17073,

are plaintiffs equitably estopped from asserting any claim of lien against the real estate acquired by the bondholders pursuant to the reorganization plan. The testimony of Mrs. Cleveland that Regtmeier, attorney for plaintiffs, approved the plan of reorganization, and authorized her to indorse such approval on the letter comprising the plan before it was mailed to the bondholders, is corroborated by the failure of Loeber or either of the other plaintiffs to object to or protest against her action in appending approval of the Leight trust to the plan. It is admitted that Loeber, managing trustee of the Leight Trust, received and receipted for copies of the printed plan and follow-up letter mailed to the bondholders, both showing approval of said plan by Loeber in behalf of the Leight trust, and it would seem to render it immaterial whether or not Loeber's approval of the plan was originally had, since with full knowledge he failed to disavow it. Plaintiffs insist that the doctrine of estoppel cannot be invoked against them because the bondholders, through their committee, had actual knowledge of the omission of the Leight trust from participation in the proposed reorganization, and are presumed to be equally cognizant with them of the fact that the lien of the interest coupons owned by said Leight Trust was not extinguished by the sale under the foreclosure decree in case No. B-196773 because of the subsequent redemption therefrom.

The obvious purpose of securing plaintiffs' approval of the plan of reorganization was to induce the bondholders to agree to the plan and deposit their securities with one of the designated depositaries of the committee. It is fair to assume that the relations between the Leight Trust and the bondholders and its influence with them, as well as their confidence in it, were undoubtedly counted upon to encourage the bondholders to accept the plan. Whether plaintiffs actually approved the plan of reorganization or failed to renounce the placing of their approval on it when they were apprised

are plaintiffs contend, overcome from some time, and in a plan against the road course required by the reorganization committee to the reorganization plan. The testimony of Mr. Lawrence Ter-meier, attorney for plaintiffs, approves the plan of reorganization, and authorized her to indicate such approval on the ballot covering the plan before it was mailed to the bondholders. It concurred by the failure of lessor or either of the other plaintiffs to object to or protest against her action in expressing approval of the Insight trust to the plan. It is admitted that lessor, representing holders of the Insight Trust, received the bondholder's copies of the reorganization plan and informs-up letter mailing to the bondholders, but expressing approval or said plan by lessor in behalf of the Insight trust, and it would seem to result in the material question as not lessor's approval of the plan was originally had, since with full knowledge he failed to disavow it. Plaintiffs insist that the doctrine of estoppel cannot be invoked against them because the bondholders, through their committee, had actual knowledge of the omission of the Insight trust from participation in the proposed reorganization, and are presumed to be equally cognizant with them of the fact that the lien of the Insight coupons owned by said Insight trust was not eliminated by the sale under the foreclosure decree in case No. B-14772 because of the subsequent redemption therefrom.

The obvious purpose of securing plaintiffs' approval of the plan of reorganization was to induce the bondholders to agree to the plan and deposit their securities with one of the designated depositaries of the committee. It is fair to assume that the relations between the Insight Trust and the bondholders and its influence with them, as well as their confidence in it, were materially enhanced upon to encourage the bondholders to accept the plan. Neither plaintiffs actually approved the plan of reorganization or failed to re-measure the plaintiff of their approval as it was [illegible]

thereof, the result was the same in so far as the effect on the bondholders was concerned. Not only once but twice plaintiffs sat by and permitted the bondholders to believe that the Leight trust was actively participating in the plan by its approval thereof. The very plan itself indicated plaintiffs' active interest in its consummation by reason of Loeber's selection as one of the trustees to hold the stock of the contemplated 14 West Elm Street Building Corporation and to distribute the beneficial interests therein to the bondholders, and by reason of the provision therein for the payment of $4,375 for "Leight Trust expenses allocated to this building."

It must be borne in mind that the plan as outlined told the bondholders that to effect it the committee had reasonable assurance of being able to make a new loan which "will be secured by a first mortgage lien on the property" and that "upon the consummation of this plan of reorganization the bondholders who have deposited their bonds with the committee will, through their trust certificates be the owners of the entire property, subject only to the new first mortgage loan." It must also be borne in mind that pursuant to the plan the loan of $120,000 was made by the new corporation; that the title to the equity of redemption was acquired and the property redeemed from the foreclosure sale as contemplated by the plan; that approximately 99% of the bondholders deposited their bonds and received in lieu thereof certificates of beneficial interest in the stock of the newly organized 14 West Elm Street Building Corporation; that at no time during the period and process of reorganization did plaintiffs make any demand based upon their ownership of the interest coupons or the lien found in their favor in the decree of foreclosure in case No. B-196773; and that it was not until approximately a year after the reorganization had been completed, when plaintiffs brought the instant foreclosure suit May 16, 1933, that they for the first time

thereof, [illegible]
bondholders, per contra, [illegible] the present [illegible]
and by the committee the bondholders [illegible] the [illegible]
trust was actively [illegible] in the plan by its approval
thereof. The very plan itself contemplated [illegible] active interest
in its consummation by means of [illegible] to one of the
trustees to hold the title of the contemplated 14 West Elm Street
Building Corporation and to distribute the beneficial interests therein to the bondholders, and by reason of [illegible] thereof for
the payment of $4,375 for [illegible] trust expenses collected to this
solution."

It must be borne in mind that the plan of reorganization told the
bondholders that to effect it the committee had reasonable assurance
of being able to make a new loan which will be secured by a first
mortgage lien on the property and that "upon the consummation of
this plan of reorganization the bondholders who have deposited their
bonds with the committee will, through their trust certificates be
the owners of the entire property, subject only to the new first mortgage loan." It must also be borne in mind that pursuant to the plan
the loan of $135,000 was made by the new corporation; that the title
to the equity of redemption was acquired and the property redeemed
from the foreclosure sale as contemplated by the plan; that approximately 90% of the bondholders deposited their bonds and received in
lieu thereof certificates of beneficial interest in the stock of the
newly organized 14 West Elm Street Building Corporation; that at no
time during the period and process of reorganization did plaintiffs
make any demand based upon their ownership of the interest coupons
of the lien bond [illegible]
No. B-[illegible]; and that it was not until approximately [illegible] after
the reorganization had been completed, that plaintiffs [illegible]
[illegible] foreclosure sale of May [illegible], 1936, [illegible] first lien

sought to enforce their lien upon the real estate the bondholders had beneficially acquired through the consummation of the reorganization plan fostered in part and participated in by plaintiffs.

It is not charged that plaintiffs were guilty of fraudulent intent when they failed to present their claim during the period when the bondholders were being induced to accept the reorganization plan, and it is immaterial whether the failure of the Leight trust to assert its rights at that time was due purely to oversight or was due to misapprehension by plaintiffs as to the law. They did not assert their claim when they should have done so and to permit them to do so now, contrary to the assurance which they joined in giving to the bondholders that the consummation of the reorganization plan would result in their [bondholders] beneficial ownership of the property "subject only to the new first mortgage loan" would be to sanction what in effect would be an active fraud upon the bondholders. Fraudulent intent is not an essential element of estoppel. It is sufficient if a fraudulent effect ensues if a party is allowed to assume a position inconsistent with his prior declarations and conduct. In our opinion the principle of estoppel is peculiarly applicable to plaintiffs' conduct. In discussing the doctrine of estoppel in Bondy v. Samuels, 333 Ill. 535, the court said at pp. 545-546:

"An equitable estoppel depends upon the facts of the particular case. The general rule is, that where a party by his statements and conduct leads another to do something he would not have done but for such statements and conduct, the guilty party will not be allowed to deny his utterances or acts to the loss or damage of the other party. (Heidhardt v. Frank, 325 Ill. 596.) The party claiming an estoppel must have relied upon material acts and representations and must have had no knowledge or convenient means of knowing the true facts. (People v. Chicago, Burlington and Quincy Railroad Co., 290 Ill. 327.) Fraud is a necessary element of estoppel but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow allowing a party to set up a claim inconsistent with his former declarations. Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent.

[illegible] to endorse their [illegible] upon the [illegible] the [illegible] had [illegible] illegally [illegible] through the [illegible] of the [illegible] nation plan [illegible] in [illegible] and [illegible] by [illegible].

It is not clear that [illegible] was [illegible] of [illegible] intent when they [illegible] to [illegible] [illegible] in [illegible] the [illegible] when the bondholders were [illegible] to [illegible] the [illegible] plan, and it is [illegible] that [illegible] the [illegible] of the [illegible] to assert its [illegible] [illegible] [illegible] [illegible] or [illegible] due to misapprehension by [illegible] as to the law. They did not assert their claim that they should have [illegible] and to permit them to do so, contrary to the [illegible] which they [illegible] in giving to the bondholders [illegible] the [illegible] of the [illegible] plan would result in their [bondholders] [illegible] [illegible] of the property "mortgaged only to the [illegible] mortgage loan" would be to sanction what in effect would be an active fraud upon the bondholders. Estoppel [illegible] is not in [illegible] [illegible] of [illegible]. It is sufficient if a [illegible] effect comes in a party is [illegible] to assume a position inconsistent with his prior declarations and conduct. In our opinion the principle of estoppel is peculiarly applicable to [illegible] [illegible]. In discussing the doctrine of estoppel in Hardy v. [illegible], 388 Ill. 548, the court said at pp. [illegible]:

> "An equitable estoppel depends upon the facts of the particular case. The general rule is, that where a party by his [illegible] and conduct induces another to do a [illegible] he [illegible] not have done but for such statements and conduct, the party [illegible] will not be allowed to deny his assertions or acts to the loss or damage of the other party. (Bellingham v. Kipp, [illegible] Ill. [illegible].) The party claiming an estoppel must have relied upon material acts and representations and must have had no knowledge or convenient means of knowing the true facts. (Koch v. [illegible], Building and Loan Institution, [illegible] Ill. [illegible].) Fraud is a necessary element of estoppel but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow allowing a party to act up a claim inconsistent with his former declarations. Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, by the circumstances, leaves other

(Milligan v. Miller, 253 Ill. 511; Oliver v. Ross, 298 id. 624.) It is the duty of a person having a right, and seeing another about to commit an act infringing upon it, to assert his right. He cannot by his silence induce or encourage the commission of the act and then be heard to complain. (11 Am. & Eng. Ency. of Law, - 2d ed. - 427, 428; 16 Cyc. 771-796.) Unreasonable delay, unexplained by equitable circumstances, has been declared evidence of acquiescence and will bar relief."

Plaintiffs suggest that the reason their claim was not presented before the bondholders had materially altered their position was because of their misapprehension as to the law, in that prior to and during the period of reorganization they were of the opinion that their junior lien was extinguished in the other foreclosure proceeding and claim that, inasmuch as the facts were equally known to the bondholders or at least equally accessible to them, the rule of estoppel is inapplicable. This contention is without merit. Regardless of such facts as were within the knowledge of the bondholders or which were equally accessible to them, the material and all important thing which they had no knowledge of, and which plaintiffs had induced them to believe did not exist, was the lien which the Leight trustees now attempt to assert. By reason of the conduct of plaintiffs, the bondholders agreed to the plan of reorganization in the confident belief that through their beneficial trust certificates in the stock of the 14 West Elm Street Building Corporation they would be the sole owners of the entire property, subject only to the new first mortgage lien of $120,000. In Howe v. South Park Comm'rs et al., 119 Ill. 101, the court said at p. 117: "The party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title or render it invalid and diligent in his application for relief." We think that principle is equally applicable here and that plaintiffs' predicament is chargeable solely to their lack of diligence in discovering their rights and asserting them. The bondholders surely were not chargeable with the duty of discovering plaintiffs' rights,

[illegible] is the duty of a person having a right, and seeing another about to commit [illegible] to assert his right. He cannot by his silence [illegible] encourage the commission of the act and then be heard [illegible] Law, – 2d ed. – [illegible], 1063; 21 Cyc. [illegible] unexplained [illegible] of acquiescence and [illegible]."

Plaintiffs contend that the present claim [illegible] not presented before the conclusion [illegible] their position was because of their misapprehension as to the law, in that prior to and during the period of reorganization [illegible] of the opinion that their junior lien was [illegible] by the other foreclosure proceedings [illegible] were equally known to the [illegible] to them, the rule of estoppel is inapplicable. This contention is without merit. Regardless of such fact [illegible] knowledge of the bondholders [illegible] the material and all important thing which they had knowledge of, and which plaintiffs [illegible] the lien which [illegible] of the consent of plaintiffs, [illegible] reorganization in the [illegible] trust certificates in the [illegible] Corporation they would be the sole owners of the [illegible] property, subject only to the [illegible] first mortgage lien of [illegible]. In [illegible] v. [illegible] et al., 118 [illegible], the court [illegible] said: "The party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title or render it invalid and diligent in his application for relief." [illegible] think that principle is equally applicable here [illegible] plaintiffs' [illegible] is [illegible] [illegible] with the [illegible] of [illegible].

and we think it would be unconscionable under all the circumstances to now impose upon them the burden of plaintiffs' lien claim amounting with interest to more than $40,000.

We have carefully considered such other points as have been urged and all the authorities cited, but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to dismiss plaintiffs' bill of complaint for want of equity.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

38907

PAUL C. LOEBER et al., Appellees, v. 14 WEST ELM STREET BUILDING CORPORATION, a corporation, et al., Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

Plaintiffs filed a petition for rehearing April 9, 1937, in which they contend inter alia that this court "disregarded the proposition that any action or failure to act of Paul C. Loeber, who was only one of the three plaintiffs, all of whom are acting in the fiduciary capacity as trustees, cannot be regarded as constituting an estoppel since the express declaration of trust appointing him required the concurrent action of two out of three trustees." It is sufficient answer to this contention to state that the question raised in the contention was raised neither in the trial court nor in plaintiffs' brief filed in this court, and that it is the recognized and established rule that a question presented for the first time on petition for rehearing will not be considered.

PETITION FOR REHEARING DENIED.

[illegible]

[illegible] C. [illegible] et al.,
Appellees,

v.

[illegible]
et al.,
Appellants.

[illegible]

[illegible]

Plaintiffs filed a petition for rehearing April 6, 1967, in which they contend Labor also has this court "disregarded the proposition that any action by Congress or, as Justice Loeber, who was only one of the three dissenters, all of them are acting in the idealistic conscience of humanism, cannot be regarded as constituting an engraved since the supreme declaration of true spokesman has mandated the commitment nation of two out of three tribunals." It is unfortunate cases to this contention to state that the question raised in the contention was raised neither in the trial court nor in plaintiffs' brief filed in this court, and that it is the longstanding and established rule that a question unmentioned in the first case on petition for rehearing will not be considered.

38954

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MELVIN L. STRAUS, as trustee,
Plaintiff,

v.

SAMUEL E. ZUKER et al.,
Defendants.

SAMUEL E. ZUKER and HANNAH ZUKER,
Appellants,

v.

HARRIET GRATZ KEENE, ERWIN FERDINAND KEENE, FRANCES ELIZABETH KEENE, NORTHERN TRUST COMPANY, as trustee, under the last will and testament of Caroline Baker Keene, deceased, and CHICAGO TITLE & TRUST COMPANY, a corporation,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree entered February 3, 1936, cancelling a ninety-nine year leasehold to certain property involved herein and directing the receiver to surrender the possession thereof to the intervening petitioners, who were the owners of the fee of said property.

Samuel E. Zuker and Hannah Zuker were defendants, among others, in a proceeding brought by Straus, as trustee, in 1931, to foreclose a mortgage bond issue on the leasehold covering the property in question. They appeared and filed their answer in said action by H. J. Rosenberg, their attorney, who is also their attorney as appellants here. The building on the leased premises was in the hands of the receiver appointed by the court in the foreclosure

action. The ground rent under the lease was not paid since February, 1933, and taxes which the lessees covenanted to pay were in default for several years. On account of these defaults the owners of the underlying fee in the fall of 1935 served the proper notices and took all steps required under the provisions of the lease to effect a forfeiture of same. The fee owners thereby became entitled to possession of the premises. Because such possession was in the hands of the court's receiver in the foreclosure proceeding, it was necessary to apply to that court for an order directing the receiver to relinquish possession to said fee owners. This the fee owners did by filing their intervening petition in the foreclosure action, setting up the foregoing facts and asking for such order. To this petition the Zukers, among others, were made defendants and they were served with process issued pursuant to the prayer of said petition. Notice was served upon H. J. Rosenberg, the attorney for the Zukers, in the foreclosure case of the application for leave to file said intervening petition. No attention was paid by the Zukers or their attorney to said process or said notice. They wholly failed to appear in the matter of the intervening petition. Nevertheless, January 10, 1936, a further notice was served upon attorney Rosenberg that on January 13, 1936, application would be made to the court for a default order as to the Zukers. No attention was paid to this notice and January 13, 1936, an order was entered of record finding that Samuel M. Zuker and Hannah Zuker had failed to answer or otherwise plead to the intervening petition and directing that same be taken pro confesso against them. No further notice of the proceedings under said intervening petition was served upon the Zukers, although the subject matter of same was referred to a master, who heard evidence and filed his report pursuant to which the court entered its order February 3,

action. The ground [illegible] the Bakers had not paid since February, 1893, and taxes that the former covenanted to pay were in default for several years. By reason of these defaults, the owners of the underlying fee in the land [illegible] the proper notices and took all steps required under the provisions of the lease to effect a forfeiture of same. [illegible] thereby became entitled to possession of the premises. However such possession was in the hands of the receiver appointed in the foreclosure proceeding, it was necessary to apply to that court for an order directing the receiver to relinquish possession to said fee owners. This the fee owners did by filing their intervening petition in the foreclosure action, setting up the foregoing facts and asking for such order. To this petition the Bakers, among others, were made defendants and they were served with process issued pursuant to the prayer of said petition. Notice was served upon M. J. Rosenberg, the attorney for the Bakers, in the foreclosure case of the application for leave to file said intervening petition. No attention was paid by the Bakers or their attorney to said process or said notice. They wholly failed to appear in the matter of the intervening petition. Nevertheless, [illegible] notice was served upon attorney Rosenberg that on January 28, 1895, application would be made to the court for a default order against the Bakers. No attention was paid to this notice and January 31, 1895, an order was entered of record finding that Samuel M. Baker and Hannah Baker had failed to answer or otherwise plead to the intervening petition and directing that same be taken pro confesso [illegible] [illegible]. No further notice of the proceedings under said intervening petition was served upon the Bakers, [illegible] of same was referred to a master, who heard evidence and filed his report pursuant to which the court entered its order directing a

1936, directing the receiver to relinquish possession of the real estate to the intervening petitioners. Counsel for the Zukers happened to be in court on another matter connected with the receivership in the foreclosure case when the master's report was submitted for approval and moved for leave to file exceptions thereto, which motion was denied.

The Zukers contend that the proceedings before the master, the approval of the master's report and the entry of the decree were irregular, improper and void because of the failure of the intervening petitioners to comply with the rules of the circuit court as to notice; and that, having been defaulted for want of an answer and not for want of an appearance, they were entitled to notice of the reference to the master, of the hearings before the master and of the completion of the master's report, so that they might be afforded an opportunity to file their objections thereto, and of the presentation of said report to the court for approval.

The intervening petitioners insist that the appellants as defendants to their intervening petition received all notice to which they were entitled under the law and the rules of the circuit court.

In Bruner et al. v. Battell, exec'r, 83 Ill. 317, service was had upon the defendant by publication and he assigned as error the failure to give him notice of the reference to and hearings before the master, notwithstanding that he had been defaulted for want of appearance, the court said at p. 322:

"The defendant had all the notice to which the law gave him the right, as a non-resident. So far as the subject matter of the litigation was concerned, he was, theoretically, before the court. He was entitled to answer if he chose to do so, and when he did not do so he is presumed to have waived the right. By waiving the right and permitting a default, he waived the rights incident to a contest upon an answer. It was said by this court in Moore et al. v. Titman, 33 Ill. 366, that 'it is only in contested cases, where a reference is made to report evidence or to hear proofs and report facts, that

1956, directing the receiver to maintain possession of the [illegible] and notes in the forthcoming proceedings. [illegible] for the [illegible] appeared to be in [illegible] and a motion to [illegible] commenced [illegible] the proceedings in the [illegible] court. [illegible] the [illegible] was submitted for approval [illegible] and leave to [illegible] thereto, which motion was denied.

The [illegible] contend that in [illegible] the [illegible], the approval of the [illegible] and the [illegible] of the [illegible] intervening petitioners to comply with the rule of the [illegible] court to [illegible] notice; and that [illegible] for [illegible] an answer and not for [illegible] of an [illegible], [illegible] notice of the reference to the [illegible], if the [illegible] matter and of the consideration of the [illegible] report, so that they might be afforded an opportunity to file their objections [illegible] and of the presentation of the report to the court for [illegible].

The intervening petitioners [illegible] as defendants to their intervening petition [illegible] motions to which they were entitled under the [illegible] of the [illegible] rule.

In Brewer et al. v. Bethell, supra, 25 Ill. 354, the [illegible] was had upon the defendants by publication and [illegible] the failure to give the notice of the [illegible] to the intervenor before the master, [illegible] was held to be not [illegible] of appearance, the court said, p. 358:

"The defendants had all the notice [illegible] the [illegible] was right, as a non-resident. [illegible] the [illegible] of the litigation was concerned, he was, theoretically, before the court. He was entitled to answer if he chose to do so, and when he did not do so he is presumed to have waived the right. By waiving the right and permitting a default, he waived the right insisted on [illegible] appear or answer. It was held by this court in [illegible] v. [illegible], 25 Ill. 366, that it is only in contested cases, where a reference is made to report evidence or to hear proofs [illegible], that

the rule [requiring notice to be given the defendant to appear before the master] is applicable. It is true, the parties being in court, they have the right, in a case where the bill is taken as confessed, to appear before the master, on a reference, if they think proper. But in such a case the practice does not require notice.'"

In both the Bruner case, supra, and the Moore case cited therein, the defendants were defaulted for their failure to appear. In Craig v. McKinney, 72 Ill. 305, where the rule announced in the Moore case is distinguished as not being applicable to the question of whether defendants who have been defaulted for want of an answer are entitled to notice of all the proceedings before the master, the court said at pp. 313-314: "As an authority that such a notice is not required in cases where a default has been taken and a reference is made, Moore et ux v. Titman, 33 Ill. 358, is cited. The rule there laid down was correct as applicable to such a case as that, where a bill to foreclose a mortgage had been taken as confessed, and reference made to the master to ascertain the amount due and report to the court. The duty of the master there was one of mere computation from written evidence of indebtedness in the case, admitted by the bill having been taken pro confesso. No reference there was needed. The court might have made the computation from evidence already in the case, and have pronounced the decree. But to extend the rule to all cases where a default has been taken, is not warranted by authority. In 2 Daniels Ch. Pl. and Pr., 3d ed., 1152, the author, in treating on this subject, says: "'The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the master, extends to cases in which a defendant, after appearance to the subpoena, has allowed the bill to be taken against him pro confesso, and a decree to be made for want of an answer.' We are of opinion there should have been, here, notice to the defendant of the taking of the account, so that he might have had opportunity to appear before

the rule [illegible] notice to be given [illegible] to appear before the master [illegible] Mr. L. Bates, who practices [illegible] in court, they have the right, in a [illegible] case, [illegible] to conference, to appear before the master, or a [illegible] judge, if they think proper. But in most [illegible] practice, [illegible] require notice."

In each the Brown case, [illegible], and the Moore case cited herein, the [illegible] in Grady v. Robinson, 78 Ill. 148, where the rule announced in the Moore case is distinguished on not being applicable to the question of whether defendants who have been defaulted for want of an answer are entitled to notice of all the proceedings before the master, the court said at p. 151-152: "We are unknowing that such a notice is not required in cases where a default has been entered, a reference is made, Moore vs. Wilson, 54 Ill. 158, is cited. The rule there laid down was confined in applicability to such a case as that, where a bill to foreclose a mortgage had been taken as confessed, and reference made to the master to ascertain the amount due and report to the court. The only or the master there was one of mere computation from admitted evidence of indebtedness in the case, admitted by the bill having been taken pro confesso. No reference there was needed. The con[illegible] have the computation from evidence already in the case, and have pronounced the decree, but to extend the rule to all cases where [illegible] has been taken, is not warranted by authority. In [illegible] Ill. [illegible], the court, [illegible] the matter, in treating on this subject, says: "This general rule, that all persons having an interest in the result of the proceeding should have notice of the adjudication [illegible] the matter, [illegible] to cases in which a determination, after reference to the [illegible], has allowed the bill to be taken against him pro confesso, and a decree is be made for want of an answer." In one of [illegible] there should have been, here, notice to the defendant of the taking of the account, so that he might have had opportunity to appear before

the master on the reference."

It will be noted that in the Craig case the reference to the master was for an accounting as it was in Acme Copying Company v. McLure, 41 Ill. App. 397, where the court said at p. 399:

"The practice in this State as to notice, both at law and in equity, is too loose for safety. But the case of Craig v. McKinney, 72 Ill. 305, has set a limit in one particular. That case was not very unlike this. A default for want of answer after demurrer and plea overruled, was entered, upon a bill filed for an account; * * *. The court held that there should have been notice to the defendant of the taking of the account."

In Armstrong v. Douglas Park Bldg. Ass'n, 60 Ill. App. 318, where default was entered for want of appearance, it was said on p. 320:

"A distinction exists between decrees pro confesso under the statute for want of an appearance and decrees pro confesso for want of an answer after appearance. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings may be ex parte. Daniells' Ch. Pleadings and Practice, 5th American edition, 1175; Van Valkenburgh v. Trustees, 66 Ill. 104."

While the case of Straus et al. v. Biesen, 242 Ill. 370, involved an action at law, we think that the reasoning therein is equally applicable to a proceeding in equity. In that case the court said at pp. 373-374:

"Plaintiffs contend that the rule requires notice only when a party is not in default and that defendants being in default for failure to plead were not entitled to notice, citing Precision Products Co. v. Cady, 233 Ill. App. 72. Undoubtedly this case so holds, contrary to Kalkaska Mfg. Co. v. Thomas, 17 Ill. App. 235; Chicago & M. Elec. Ry. Co. v. Krempel, 116 Ill. App. 253; American Mail Order Co. v. Marsh, 118 Ill. App. 248, which cases the opinion undertakes to distinguish. The Cady case seems to rest on the holding of the Supreme Court in Cramer v. Illinois Commercial Men's Ass'n, 260 Ill. 516, where it was held that, unless there is a rule of court requiring such notice, there is no error in taking a default where the defendants have failed to plead.

"We are inclined to agree with the decision in the Cady case in so far as it holds that the default order should not be set aside. But there is another point which is not discussed in that or in the Cramer case. It is the established practice that the defendants' rights are not wholly foreclosed by the default. While such a default admits every material allegation of the declaration, it does not admit the amount of damages and upon the execution of the writ of inquiry before the court, while the defendant cannot introduce evidence tending to dispute the

the matter on the reference."

It will be noted that in the Tingley case the reference to the matter was for an accounting as it was in Lane Bryant Company v. Holmes, 21 Ill. App. 207, where the court, said at p. 209:

"The proceeding in which facts are to be stated, is a law and in equity, is too loose for safety. But the case of Tingley v. Molliman, 72 Ill. 388, has not a limit in the pleadings. That case was not very unlike this. A defendant for want of answer after demurrer had been overruled, was ordered, upon a bill filed for an account; * * *. The court held that there should have been notice to the defendant of the taking of the account."

In Annenberg v. Lowden Bank & Trust, 60 Ill. App. 316, where default was entered for want of appearance, it was said on p. 320:

"A distinction exists between decrees pro confesso under the statute for want of an appearance and decrees pro confesso for want of an answer after appearance. In the former, there being no one upon the plaintiff can serve, all the necessary proceedings may be ex parte. Daniell's Ch. Pleadings and Practice, 5th American edition, 1176; Van Valkenburgh v. Thompson, 2 Ill. 124."

While the case of Strong et al. v. Sproule, 228 Ill. 570, involved an action at law, we think that the reasoning therein is equally applicable to proceeding in equity. In that case the court said at pp. 572-574:

"Plaintiff's contend that the rule requires notice only when a party is not in default and that defendants being in default for failure to plead were not entitled to notice. Citing Freeman Products Co. v. Cody, 158 Ill. App. 72. Unfortunately this case so holds, contrary to Kalkoske Mfg. Co. v. Brown, 17 Ill. App. 205; Chicago & N. Ice Co. v. Hammond, 120 Ill. App. 329; Annenberg v. Lowden Bank & Trust, 60 Ill. App. 316. The Cody case seems to rest on the holding of the Supreme Court in Kenney v. Illinois Commercial Men's Assn., 158 Ill. 576, where it was held that, unless there is a rule of court requiring such notice, there is no error in taking a default where the defendants have failed to plead.

"We are inclined to agree with the decision in the Cody case in so far as it holds that the default order should not be set aside. But there is another point which is not discussed in that or in the Kenney case. It is the established proposition that the defendants' rights are not wholly foreclosed by the default, while such a default admits every material allegation of the declaration, it does not admit the amount of damages and upon the ascertainment of the amount of damages, which the defendant cannot introduce evidence tending to dispute the

allegations of the declaration or to show that the plaintiff has no cause of action, which are admitted by the default, still he has the right to appear and cross-examine plaintiff's witnesses and introduce witnesses on his part upon the question of damages, ask for instructions on that question and preserve his right for review on that branch of the case by a bill of exceptions. Cook v. Skelton, 20 Ill. 107; Chicago & R. I. R. Co. v. Ward, 16 Ill. 522; Cairo & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Pfaff v. Pacific Express Co., 251 Ill. 243.

"The defendants were not in complete default. Their default admitted the cause of action, but not the amount of damages. Consequently, under the rule they were entitled to notice of the assessment of damages so that they might participate in the proceedings. In view of the number of suits in this county and the volume of business, this is a reasonable application of the rule. Williams v. Morton, 135 Ill. App. 112, and Ostrobramy v. Barczaitis, 139 Ill. App. 94, are directly in point."

All these cases recognize the rule that a defendant who has been duly defaulted for failure to appear has no right to notice of subsequent proceedings in the cause. In Craig v. McKinney, supra, and some of the other cases cited, it is held that a defendant who has appeared, but allowed the bill to be taken against him pro confesso for want of an answer, is still entitled to notice of reference to and hearings before the master, if an account is requested, contemplated and actually had. The Zukers attempt to bring themselves within the rule enunciated in the last mentioned cases by urging that they appeared and answered the bill to foreclose, and by stressing the fact that the intervening petitioners asked that an accounting be had of the amounts due and owing to them under their lease, and that they might have judgment therefor against such of the defendants as were legally obligated to pay same.

Notwithstanding that the intervening petition was filed in the foreclosure proceeding, was it not in the nature of an entirely separate and distinct action? The facts alleged in the intervening petition as to the defaults under the lease, the service of notice of forfeiture, the declaration of forfeiture, etc., weresufficient to support a separate action by the owners of the fee for possession. The only reason for the intervention was that the receiver in the foreclosure case had possession of the property. No issue involved

allegations of the defendants or on their part [illegible] has no cause of action. [illegible] be [illegible] the right to report and [illegible] manner and [illegible] damages, and for [illegible] right [illegible] tions. Cook v. Jenkins, 79 Ill. App. [illegible] Ward, 12 Ill. App. [illegible] 419; Ellis v. Pacific [illegible] 1. [illegible] defendants maintained the cause of action, [illegible] tenant. Irrespectively, [illegible] in the proceedings. [illegible] and the value of [illegible] the rule. Williams v. [illegible] v. Beversdorf, 1.8 Ill. App. 5[illegible] [illegible] in point."

All these cases recognize the rule that a defendant who has been duly defaulted for failure to appear has no right to notice of subsequent proceedings in the cause. In Gridley v. [illegible], supra, and some of the other cases cited, it is held that a defendant who has appeared, but failed to file an answer, is not entitled to notice of subsequent proceedings in the cause, in which pleadings or motions or reference to and hearings before the master, if an accounting is requested, continually run. The minors attempt to bring themselves within the rule enunciated in the Lord decision cited by stating that they appeared and received the bill to dismiss, and by stressing the fact that the trial court's prejudicial order that an accounting be had of the amounts due was entered in their under-sized leases, and that they might have judgment thereof against each of the defendants as were legally obligated to pay same.

Form substantially that the intervening petition was filed in the foreclosure proceeding, nor is not in the nature of an entirely separate and distinct action. The state [illegible] in the intervening petition as to the defendants under the lease. The [illegible] of notice of foreclosure, the description of foreclosure, etc., [illegible] to support a separate action by the owners of the [illegible] The only reason for the intervention was that the mortgagee in the foreclosure case had possession of the property. No issue involved

in the matter of the foreclosure was involved in the intervening petition. The real issue raised by the latter was whether the intervening petitioners were entitled to possession and whether the receiver should relinquish it, and that was the only issue decided by the master or the decree of the court.

There was no accounting in the true sense before the master. An inspection of the record discloses that the master merely heard evidence sufficient to establish that there were defaults under the lease and that the fee owners had properly forfeited same. There was no finding by the master as to any definite amount due the intervening petitioners from any defendant and the decretal order appealed from contains no such finding or judgment. There was no accounting within either the ordinary or legal acceptation of that term and the reference to the master was really unnecessary after the pro confesso order was entered as to all defendants to the intervening petition.

Whether the filing of the intervening petition is considered in the nature of the institution of an independent proceeding in which the Zukers were bound to appear, notwithstanding their appearance in the original foreclosure proceeding, to prevent their being defaulted for want of an appearance, or whether we consider their default in the light of their failure to file an answer to the intervening petition, no accounting having been either necessary or had in the hearing by the master and no amount having been found due and owing by the Zukers or either of them in the decree of the court, in our opinion, in the absence of a rule of court to the contrary, they received all the notice they were entitled to under the general rules of equity practice.

But there was a rule of the circuit court in force at the time the intervening petition was filed which covered the particular situation involved here and such rule is still in force. The law

In the matter of the foreclosures now involved in the intervening petition. The usual decree rendered by the lower was whether the intervening petitioners were entitled to possession and whether the receiver should relinquish it, and that was the only issue decided by the master or the decree of the court.

There was no accounting in the true sense before the master. An inspection of the record discloses that the matter merely heard evidence sufficient to establish that there were defaults under the leases and that the fee owners had properly foreclosed same. There was no finding by the master as to any definite amount due the intervening petitioners from any defendant and the decretal order appealed from contains no such finding or judgment. There was no accounting within either the ordinary or legal acceptation of that term and the reference to the master was merely necessary after the pro confesso order was entered as to all defendants to the intervening petition.

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But there was a rule of the circuit court in force at the time the intervening petition was filed which covered the particular situation involved here and such rule is still in force. The law

is settled that rules of court, when entered of record, become the law of procedure in matters to which they relate when not inconsistent with statutes and are binding upon the courts. (Straus et al. v. Biesen, supra.) Rule 16, sec. 1 of the rules of the circuit court provides:

"No motion will be heard or order made in any cause without notice to the opposite party after such party has entered his appearance, so long as he is not in default for want of an answer, except when a cause is reached on the trial call and called for trial. A defendant who has appeared, even though in default for want of an answer, shall be entitled to notice, unless after notice to him his default has been entered of record. But the court may by order direct that notice of any or all proceedings be given to any defendant so defaulted of record."

While counsel for the Zukers relies on this rule in support of his contention that they were entitled to notice of the hearings before the master, it is difficult to understand how it can be construed otherwise than as contrary to such contention. It states in clear, plain and readily understandable English that "a defendant who has appeared, even though in default for want of an answer, shall be entitled to notice, unless after notice to him his default has been entered of record." (Italics ours.) As heretofore stated, notice was served on the attorney for appellants of the motion for leave to file the intervening petition, and, pursuant to the order of court allowing it to be filed, summons was served on each of the Zukers. Thereafter notice was served on the attorney for appellants of the application of the intervening petitioners that said appellants be defaulted for want of an answer. The default of the Zukers was entered of record January 13, 1936. The notice given to the attorney for the Zukers of the application for default and the entry of the order of default pursuant thereto brought the parties squarely within the provisions of the above quoted rule of the circuit court and we are of the opinion that appellants received all the notice they were entitled to.

For the reasons stated herein the decree of the circuit court is affirmed. AFFIRMED.

Friend and Scanlan, JJ., concur.

38748

LEWIS MYERS,
Appellant,

v.

HEITMAN TRUST COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

259 I.A. 619

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Lewis Myers filed his complaint in the Superior court against Heitman Trust Company seeking to set aside as fraudulent a contract entered into between the parties June 10, 1932, or, in the alternative, that defendant pay him the face value, with interest, of certain mortgage bonds purchased or received in exchange for stock in defendant corporation; for the removal of defendant as trustee under an indenture of trust securing mortgage bonds owned by plaintiff; for the appointment of a receiver, and other relief. The cause was referred to a master, and twice rereferred, resulting in three separate reports, all finding the equities in favor of plaintiff and recommending the relief prayed. The chancellor sustained exceptions filed by defendant to all the reports and dismissed the bill for want of equity. This appeal followed. Plaintiff, quite aged and too ill to participate in the hearings before the master, died during the pendency of this appeal, and by leave of court the executors of his estate were substituted as parties plaintiff.

The complaint alleged, in substance, that prior to September 22, 1926, Heitman Bond & Mortgage Company was organized as an Illinois corporation and engaged in the bond business; that

November 30, 1926, it changed its name to Heitman Trust Company, and at the same time became qualified to act as trustee, and since the amendment of its charter it acted as trustee in all its own bond issues; that September 22, 1926, plaintiff purchased certain securities from defendant and received from it a letter agreeing that in the event of a default for the period of thirty days in the payment of principal or interest, it would repurchase the securities at par and accrued interest; that thereafter $28,500 of the bonds matured and upon default defendant repurchased those bonds and paid $13,500 part cash, and on August 3, 1931, delivered to plaintiff $15,000 bonds of the Lake View Mansions, with a similar repurchase agreement; that in March, 1932, one of the mortgages matured, and upon default and defendant's refusal to comply with its agreement suit was instituted in the municipal court, resulting in a settlement agreement dated June 10, 1932, under the terms of which defendant agreed in writing to pay interest semiannually, at 6%, and plaintiff agreed to dismiss the suit and to extend the maturities of the securities at their respective due dates upon payment of interest; that defendant also agreed to repurchase these extended securities in the event of a further default, at par plus interest. It is alleged that defendant refused to comply with its agreement and failed to pay the interest at 6%, but in one instance tendered interest at 3% and also tendered an extension agreement which required the mortgagor to surrender possession to it and out of the income to pay 3% interest on the securities, with the provision that as long as such interest should be paid there could be no acceleration for a period of five years, and that defendant had the right to use the income to pay itself $3,275 for commission in

procuring the extension, and also to pay certain defaulted coupons which were subordinated under the settlement agreement; but that plaintiff refused to accept the extension agreement and the reduced interest.

It is also alleged that there was due on the "Drexel" property taxes for the years 1927, 1928, 1929, 1930, 1931 and 1932, aggregating $10,110.69, and accrued penalties in the amount of $3,275.48; that defendant, trustee of the bond issue and in possession of the premises, failed to pay any taxes prior to the application for a receiver under the Skarda act, September 5, 1933; that on the Rifkin property there was due for taxes for the years 1928, 1929, 1930, 1931 and 1932, the aggregate sum of $3,010.72, plus penalties amounting to $1,575.17 and special assessments aggregating $2,805.35; that on the Lake View Mansions there was due the 1930 taxes, in the sum of $13,529.25, plus 12% penalties, on which there had been paid on account only $3,827.26, and that the property was sold for nonpayment of special assessments July 15, 1933, and no redemption thereof made; that defendant diverted $5,682.16 of the income from the Drexel property for its own use, and it is alleged that all these matters were concealed from the plaintiff when the settlement agreement of June 10, 1932, was made, and that if such facts had been revealed plaintiff would never have entered into the settlement. There are charges of gross negligence on the part of defendant to protect the trust properties, the betrayal of its trust duties in the management thereof, the allowance of the forfeitures, sales and penalties, of malfeasance and misfeasance of defendant as trustee, and a prayer for the various items of relief hereinbefore stated.

A motion of defendant to strike the complaint was overruled by the chancellor and thereafter defendant filed its sworn answer admitting the execution of the agreement dated September 22, 1926,

procuring the extension, [illegible] which were subordinated under the settlement agreement; but that plaintiff refused to accept the [illegible] [illegible].

It is also alleged that there was due [illegible] property taxes for the years 1927, 1928, 1929, 1930 and 1931, aggregating [illegible],110.09, and accrued penalties in the amount of $3,375.43; that defendant, trustee of the bond issue and in possession of the premises, failed to pay any taxes prior to the application for a receiver under the bond [illegible]; that on the subject property there was due and unpaid for the years 1928, 1929, 1930, 1931 and 1932, the aggregate sum of [illegible], plus penalties amounting to [illegible] and special assessments aggregating $2,805.35; that on the date of filing [illegible] there was due the 1933 taxes, in the sum of [illegible], plus [illegible] penalties, on which there had been paid on account only [illegible], and that the property was sold for nonpayment of special assessments July 15, 1931, and no redemption thereof made; that defendant diverted $5,652.15 of the income from the trust property for its own use, and it is alleged that all these facts were concealed from the plaintiff when the settlement agreement of June 11, 1932, was made, and that if such facts had been revealed plaintiff would never have entered into the settlement. There is alleged [illegible] negligence on the part of defendant to protect the trust properties, the [illegible] of its trust duties [illegible] the forfeitures, [illegible] and penalties, [illegible] defendant as trustee, [illegible] [illegible].

A motion of defendant to strike the complaint [illegible] by the [illegible] and thereafter defendant filed its [illegible] admitting the [illegible]

the letter of August 3, 1931, and the contract of June 10, 1932, admitting that it refused to pay the 6% interest alleged, but that it tendered 3%, as well as the extension agreement charged in the complaint; that the status of the properties concerning the tax situation was true; that it became the record owner of the Drexel property and entered into possession by an assignment of rents dated May 1, 1931, and used the income to pay its commission of $3,500 for the extension. All other allegations of the complaint were denied, and it was averred by way of defense that because defendant was a trust company the agreements of September 22, 1926, of August 3, 1931, and June 10, 1932, were invalid and void, as against public policy and prohibited by the "act for the protection of bank depositors."

Upon hearing of the cause pursuant to the first reference the master found that the material allegations of the complaint were sustained, that the agreement of June 10, 1932, was valid, that the defense of ultra vires was not available to defendant, and that it was therefore liable on the Rifkin mortgage and on the Drexel bonds, all of which had matured, but was not liable on the Lake View bonds because no interest or principal was then in default; that defendant, trustee under the bond issue of the Drexel apartments, entered into possession under an assignment of rents May 1, 1931, and also became the owner of record by a deed in trust executed about the same time, and out of the income of the property wrongfully applied and diverted to its own use $3,275 in payment of commission on the proposed extension, to which plaintiff did not consent, and was therefore liable for such diversion.

Subsequent to the filing of the first report defendant presented an amendment to its answer and asked leave to file the same. The amended answer denied that it had on September 22, 1926, executed the letter alleged in the complaint, but that a complete

this Judge's order of August 6, 1941, and the contents of that Jr. Judge admitting that it refused to pay the [illegible] amount, but that it tendered [illegible], as well as the [illegible] amount which [illegible] contending that the [illegible] of the proceedings [illegible] situation are true; that it became the [illegible] owner of the [illegible] property and entered into possession by an [illegible] of [illegible] dated May 1, 1944, and that [illegible] to pay the [illegible] of $3,[illegible] for the extension. All other allegations of the complaint were denied, and it was averred by way of [illegible] that [illegible] defendant was a bona fide purchaser for [illegible] on September 30, 1944, or August 5, 1941, or June 30, 1939, [illegible] and that, as against public policy and prohibited by the [illegible] for the protection of bona fide purchasers."

Upon hearing of the cause [illegible] to his [illegible] [illegible] the master found that the [illegible] of the property [illegible] were analyzed, that the [illegible] of June 1, 1939, was valid, that the defense of [illegible] was not available to defendant, and that it was [illegible] Article [illegible] and [illegible] [illegible] bonds, all of which [illegible], but was not liable on the Lake View bonds because no [illegible] or [illegible] was [illegible] in [illegible] that defendant, [illegible] the bond issue of the [illegible] [illegible], entered into possession under an [illegible] May 1, 1941, and also became the owner of record by [illegible] [illegible] executed about the same time, and one of the [illegible] [illegible] [illegible] [illegible] and directors to its own use [illegible] in payment of commission on the [illegible] contracts, to which [illegible] did not [illegible], and was therefore liable for such diversion.

Subsequent to the filing of the first [illegible] [illegible] presented an amendment to its answer and asked leave to file the [illegible]. The amended answer denied that it had on September 30, 1939, [illegible]

contract was entered into in writing on that date, separate and apart from the letter, and that the agreement thus made did not contain any provision regarding the repurchase of the bonds in question nor any guarantee of payment, and that some time thereafter, without any consideration and without authority, Fred F. Heitman, upon the request of plaintiff, executed a letter similar in form to that charged in the complaint and shortly thereafter also executed another letter identical therewith except that it was dated some time later than September 22, 1926; that plaintiff or some person for him or on his behalf, for the purpose of making it appear that there was consideration for the letter so executed by Heitman subsequent to September 22, 1926, falsely, fraudulently and maliciously changed and altered the date of said letter and dated it back to September 22, 1926, without the knowledge of defendant or any of its agents, and that defendant first discovered the fraud and deception upon the hearing before the master when the original letter was exhibited for the first time. It was averred that the execution of the alleged agreement dated August 3, 1931, was procured by fraud and misrepresentation in holding out to defendant that the letter of repurchase or guarantee was dated September 22, 1926, when it was actually dated and delivered at a subsequent date and without consideration. The chancellor referred to the master for his recommendation the motion for leave to file the amended answer and while that motion was pending, on June 10, 1935, one Charles G. Holmberg, filed a petition alleging that he was a stockholder and director of the Heitman Bond & Mortgage Company, and its successor, continuously from January 18, 1913, and that his attention had just been called to this proceeding by which plaintiff sought to hold the Heitman Trust Company liable upon an alleged guarantee of bonds; that no authority was vested in Fred F. Heitman, as president, nor was any

authority conferred upon him by the board of directors to execute such a guarantee; that Heitman was not authorized to purchase plaintiff's stock, and that the purchase thereof, as well as the alleged guarantee of the bonds, constituted a fraud upon the other stockholders and directors, and he prayed that the alleged purchase by defendant of plaintiff's stock be rescinded and the alleged guarantee be set aside as fraudulent and void. The motion to file the intervening petition was also referred to the master for hearing.

Subsequently, July 25, 1935, Heitman Trust Company filed a petition alleging in substance that the board of directors had no knowledge that the guarantee agreement and subsequent agreements were signed by Fred P. Heitman, and that he acted without authority of the board of directors, and that newly discovered evidence had since come to the attention of the petitioner (petition signed and verified by Howard W. Bishop, duly authorized agent of the Heitman Trust Company and one of its attorneys) that when plaintiff and Fred P. Heitman were negotiating for the purchase and sale of plaintiff's stock, Heitman advised Myers that he would have to take the matter up with the board of directors, but that Myers requested him not to do so for fear that they would not consent to it and suggested that they arrange matters between themselves; the newly discovered evidence was characterized as proof of a conspiracy against the corporation, and petitioner prayed that an order be entered directing the master to reopen proofs and permit the introduction of the newly discovered evidence. This petition was likewise referred to the master, to be considered together with Helmberg's petition and also the motion for leave to amend defendant's answer. The master ultimately recommended that the additional matter introduced by defendant's amended answer be made available as defenses, heard the newly discovered evidence, but found the issues for plaintiff and recommended a decree in his favor, upon the theory that the contract

of June 10, 1932, constituted a settlement between the parties, and also recommended that Holmberg's intervening petition be dismissed for want of equity.

The essential facts disclose that Lewis Myers had for many years been a stockholder and director of Heitman Bond & Mortgage Company, engaged in the purchase and sale of mortgage bonds. The by-laws of the corporation provided that in the event of the sale of any of the capital stock by any stockholder he was required first to offer it for sale to the company at its book value according to the audit of the preceding year. Accordingly, in July, 1926, negotiations were inaugurated by plaintiff for the sale of his stock to the corporation, which culminated in the proposal and acceptance dated September 22, 1926, by which the company purchased from plaintiff his 404 shares of stock at $286 a share. The offer and acceptance by which this sale was consummated (hereinafter referred to as stock sales agreement) is as follows:

"September 22, 1926.

Heitman Bond & Mortgage Company,
10 South La Salle Street,
Chicago, Illinois.

Gentlemen:

I hereby propose to sell to you four hundred and four (404) shares of the Capital Stock of your Company at a price of $286 upon the following terms and conditions:

1. I propose to sell at once and deliver to you herewith two hundred four (204) shares of said stock.

2. I further propose to sell to you on January 3, 1927, the additional two hundred (200) shares.

3. The purchase price of said two hundred four (204) shares amounting to $58,344, I agree to accept in Drexel Mansions first mortgage bonds amounting to Eleven Thousand Dollars ($11,000), Rifkin & Epstein first mortgage Twelve Thousand Five Hundred Dollars ($12,500), Eureka Apartments first mortgage bonds amounting to Thirty Four Thousand Five Hundred Dollars ($34,500), and the remaining Three Hundred and Forty Four dollars ($344) to be adjusted upon accrued interest and the difference paid in cash.

of June 15, 1933, constituting a contract between the parties, and [illegible] that plaintiff is entitled to [illegible] for [illegible] of capital.

The essential facts disclosed by the record are that for many years been a stockholder and a director of Heitman Bond & Mortgage Company, engaged in the general bond and mortgage business. The by-laws of the corporation provided that in the event of the sale of any of the capital stock by any stockholder he was required first to offer it for sale to the company at its book value as shown by the audit of the preceding year. Accordingly, in July, 1935, negotiations were inaugurated by plaintiff for the sale of his stock to the corporation, which culminated in the proposal and acceptance dated September 23, 1935, by which the company purchased from plaintiff his 404 shares of stock at $236 a share. The offer and acceptance by which this sale was consummated (including that referred to as stock sales agreement) is as follows:

________________, 1935.

Heitman Bond & Mortgage Company,
10 South La Salle Street,
Chicago, Illinois.

Gentlemen:

I hereby propose to sell to you four hundred and four (404) shares of the capital stock of your company at a price of $236 upon the following terms and conditions:

1. I propose to sell at once and deliver to you herewith two hundred four (204) shares of said stock.

2. I further propose to sell to you on January 1, 1936, the additional two hundred (200) shares.

3. The purchase price of said four hundred four (404) shares amounting to $95,344, I agree to accept in the following first mortgage [illegible] Eleven thousand dollars ($11,000), [illegible] first mortgage Twelve thousand five hundred dollars ($12,500), [illegible] amounting to Thirty four Thousand Five Hundred dollars ($34,500), and the remaining, three hundred and forty four dollars [illegible] to be adjusted upon accrued interest and the difference paid in cash.

4. In payment of the Two Hundred (200) shares, the purchase price of which is $57,200, to be delivered January 3, 1927, I agree to accept in Drexel Mansions bonds amounting to $57,000, the difference of Two Hundred Dollars ($200) to be adjusted upon accrued interest.

In connection with these Two Hundred shares (200) I agree to deposit the same in escrow with the Foreman Trust & Savings Bank and you to deposit said Drexel Mansions bonds amounting to Fifty Seven Thousand dollars ($57,000) with Foreman Trust & Savings Bank in escrow with instructions to Foreman Trust & Savings Bank to deliver said stock to you on January 3rd, 1927, and to deliver said bonds to me on said date.

I hereby waive any right that I may have to purchase back this stock and I hereby waive any right that I may have to purchase any stock of your Company in the future, in accordance with the agreement shown by the by-laws at the time the capital stock of your Company was increased, and all my rights under said by-laws to purchase stock in your Company I hereby release and waive.

6. I further agree that my voting rights in the stock covering this proposal shall cease forthwith.

Very truly yours,
(Signed) Lewis Myers

Accepted:
Heitman Bond & Mortgage Company

By (Signed) Fred P. Heitman
President."

The Heitman Bond & Mortgage Company resold these shares to various of its directors, including Philip C. Lindgren, Fred P. Heitman, Walter E. Olson, Charles G. Holmberg and Howard F. Bishop, who paid the company in cash at the rate of $286 a share, except 25 shares which were sold to Adolph O. Hartmann at a profit on the basis of $300 a share. The company thus received the cash for the shares of stock, and paid for them in real estate bonds and mortgages which it then owned.

There was introduced in evidence at the hearing before the master another agreement (hereinafter referred to as the first guarantee agreement) dated September 22, 1926, as follows:

"Sept. 22, 1926.

Mr. Lewis Myers,
Chicago Beach Hotel,
1600 Hyde Park Blvd.,
Chicago.

Dear Mr. Myers:

On account of your having purchased the following:

Drexel Mansions Bonds Nos. 10/14, 16/18, 24/53. 56/80, 81/153	$68,000
M. Rifkin, et al. mtg. No. 2494	12,500
Eureka Apartments, No. 17/85	34,500

it is agreed between the Heitman Bank & Mortgage Company and yourself that should there be a default of principal or interest, and said default continues for thirty (30) days, during the life of the mortgage on the above properties, we agree to purchase the above said securities at par and accrued interest after the thirty (30) days have elapsed.

Likewise in connection with said purchase we have adjusted the interest and there will be due you in cash on January 3rd, 1927, the sum of $580, which sum we agree to pay you on that date.

Very truly yours,
Heitman Bond & Mortgage Company
By F. P. Heitman, President."

It was defendant's contention that this contract was entered into subsequent to September 22, 1926, and dated back, either by plaintiff or by some one on his behalf so as to make it appear that the stock sales agreement and this guarantee agreement were concurrently executed; that the stock sales agreement contained no provision for repurchase or guarantee of the bonds received by plaintiff in exchange for his stock in the company, and by reason of that fact no consideration appeared in the guarantee agreement which defendant says was subsequently executed, for the repurchase of these securities; and that in order to furnish a consideration the date of the second agreement was altered to make it appear that the two contracts had been made at the same time, and the guarantee of the bonds furnished a consideration for accepting them in exchange for the stock. Evidence was introduced pro and con on the question of alteration, and it appears from the original document, which was introduced in evidence and brought here as an exhibit, that some alteration was made in the "22" following "September" and preceding "1926". The master found that there was an alteration, but there is no convincing evidence that plaintiff fraudulently changed the

Dear Mr. Byrne:

In answer to your letter received in Edinburgh, Scotland, Mr. Allan, et al. v. Lee, et al. [illegible] it is agreed between the Mitchum Bank & Mortgage Company and yourself that should there be a mistake, it should be in interest, and will definitely come out in the [illegible] during the life of the mortgage on the [illegible] agree to purchase the above [illegible] interest after the thirty (30) days have expired.

Likewise in connection with said purchase, [illegible] the interest and there will be due you in cash on January 2nd, 1977, the sum of [illegible] you on that date.

Very truly yours,

Mitchum Bank & Mortgage Company

By [illegible]

It was Brisbane's contention that [illegible] subsequent to September 1, 1960, and dated back, either by plaintiff or by some one on his behalf so as to make it appear that the stock sales agreement and this guarantee agreement were contemporaneously executed; that the stock sales agreement contained no provision for repurchase or guarantee of the bonds received by plaintiff in exchange for his stock in the company, and by reason of that fact no consideration appeared in the guarantee agreement which contract was subsequently executed, for the purchase of bonds under circumstances; and that in order to furnish a consideration the date of the second agreement was altered to make it appear that the contracts had been made at the same time, and the guarantee of the bonds furnished a consideration for accepting them in exchange for the stock. Evidence was introduced pro and con on the question of alteration, and it appears from the original document, which was introduced in evidence and from it here on [illegible], that some alteration was made in the "30" following "September" and preceding "1960". The master found that there was an alteration, but there

date, and it was his counsel's contention that it was altered with the full knowledge and consent of Fred P. Heitman.

A third contract was entered into between the parties September 23, 1926, which is identical with the so-called altered agreement, except that it does not contain the last paragraph relating to an adjustment of interest which was to become due January 3, 1927, and under which defendant agreed to pay plaintiff $580.

August 3, 1931, defendant wrote a letter addressed to Lewis Myers and his wife, Lizzie Myers, as follows:

"Dear Sir & Madam:

In consideration of your having turned in the Eureka Apartments Bonds in the aggregate amount of $28,500, and having accepted in full lieu of cash the sum of $14,500, and accrued interest in cash, and thirty bonds, to-wit: No. 160 to 169, both inclusive, and No. 306 to 325 both inclusive, of the Lake View Mansions, each of said bonds being for the sum of $500, in the aggregate of $15,000, and executed by John Stone, a bachelor, it is hereby agreed between the said Heitman Trust Company and yourselves that should there be a default in principal or interest on any of said Lake View Mansions Bonds and said default continues for thirty days, during the life of the mortgage on said property covered by said bonds, we agree to purchase the said bonds from you at par and accrued interest after the thirty days have elapsed.

Yours very truly,
Heitman Trust Company,
By Fred P. Heitman (Signed)
President."

In November, 1931, Myers instituted suit against the Heitman Trust Company, whose name had since been changed and its charter amended so as to enable it to act as trustee, alleging a breach by defendant of the so-called altered agreement of September 23, 1926, in that it had failed to repurchase certain securities on which defaults had occurred. While this suit was pending plaintiff and defendant entered into an agreement, dated June 10, 1932, which plaintiff charged in his complaint was procured by fraud and which defendant says was made without authorization of the corporation and in violation of its charter powers and was therefore ultra vires.

The master found that the agreement was fairly entered into, that it was a settlement of the controversies then existing between plaintiff and defendant, and that it was not ultra vires. The agreement is rather lengthy, but since it is the principal subject matter of the controversy between the parties we set it forth in full, as follows:

"This agreement, made and entered into this 10th day of June, A. D. 1932, by and between Heitman Trust Company, a corporation, with its principal offices in the City of Chicago, State of Illinois, and Lewis Myers, of the City of Chicago, County of Cook and State of Illinois.

Witnesseth:

Whereas, there is now pending in the Municipal Court of the City of Chicago a suit wherein Lewis Myers is plaintiff and Heitman Trust Company, a corporation, is defendant, involving a certain agreement between the said parties, dated September 28, 1926, covering certain bonds and a certain mortgage alleged to be held and owned by the said Lewis Myers, and

Whereas, the parties hereto have had certain controversies and disputes as to claims due and owing the said Lewis Myers from the said Heitman Trust Company, arising out of the said agreement, and

Whereas, the said Heitman Trust Company and Lewis Myers are desirous of settling all of such claims, controversies, disputes and litigation between them,

Now, Therefore, for and in consideration of the premises aforesaid and for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations by each to the other paid, receipt and sufficiency whereof is hereby acknowledged by each, together with the mutual covenants hereinafter contained, it is mutually agreed as follows:

1. Heitman Trust Company will pay to Lewis Myers out of the moneys now on hand arising out of the Rifkin mortgage, and if there be no moneys on hand arising therefrom, then it will purchase, from its own funds, from the said Lewis Myers, all interest coupons and pay all interest specifically described as follows:

Trust Deed made by Morris Rifkin and Jennie Rifkin, his wife, and Morris David Epstein and Fannie Epstein, his wife, to Chicago Title and Trust Company, a corporation, as Trustee, conveying the following described property:

Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Block Two (2) in Albert F. Keeney's Belmont Home Gradens, being a subdivision of Lot Five in King and Patterson's subdivision of the Northeast Quarter (NE 1/4) of Section Twenty-nine (29), Township Forty (40) North, Range Thirteen (13), East of the Third Principal Meridian, in Cook County, Illinois;

said loan being dated September 1, 1926, and due by its terms on September 1, 1931, in the total sum of $12,500.

2. If, however, and solely in the discretion of the said Heitman Trust Company it can make satisfactory arrangements with the owners of the equity of the Rifkin property hereinabove described, then, upon request of the said Trust Company, the said Lewis Myers agrees to extend the principal payment of said Rifkin mortgage in the sum of $12,500 for a period of three years from May 16, 1932, to May 16, 1935, upon the terms that interest shall be payable upon said loan semiannually, as heretofore, and upon the same terms and conditions as to all other covenants and agreements, as set forth in the said Rifkin trust deed hereinbefore described. Provided, however, that the interest now past due is either paid to or purchased from the said Lewis Myers by the Heitman Trust Company, as provided in Paragraph First herein. It is agreed that upon the payment of any interest notes representing the said interest due or to become due, the said notes shall be cancelled and marked paid and that in connection with said Rifkin mortgage, any payments or purchases heretofore made by the said Heitman Trust Company shall be subordinated to the balance of the $12,500 which shall be extended and the notes so held by the Trust Company shall be clearly marked to indicate said subordination.

3. Said Lewis Myers further agrees that if the present owners of the equity of redemption described in said trust deed known as the Rifkin mortgage do not make some adjustment satisfactory in the sole discretion of the Heitman Trust Company, that he will deliver to the Heitman Trust Company, upon its trust receipt, all of the securities and trust deed representing the said Rifkin loan for the purposes of foreclosure by the said Heitman Trust Company, at its own expense, however, and that the said Lewis Myers will assign, without any cost to the said Heitman Trust Company, or its nominee, all his right, title and interest in and to the foreclosure proceedings now pending in the Circuit Court of Cook County, Illinois, under the title of Lewis Myers vs. Rifkin, et al., No. B-232349, so that the Heitman Trust Company, or its nominee, may proceed with said foreclosure proceedings to its final culmination, with the understanding, however, that said foreclosure proceedings should be for the benefit of the said Lewis Myers only until such time as the said Rifkin mortgage shall have been substituted with other securities by the said Heitman Trust Company, as hereinafter provided, and that upon the substitution of the securities representing the said Rifkin Loan, the said foreclosure proceedings, together with the securities thereby represented and/or the propertyforeclosed upon shall become the sole and exclusive property of the Heitman Trust Company.

Said Lewis Myers further agrees to assign to Heitman Trust Company all of his right, title and interest in and to the judgment by confession obtained in the Municipal Court of the City of Chicago, in the case of Myers v. Rifkin, et al., No. 2756016, which said judgment was obtained on November 5, 1931, together with all of his right, title and interest in and to the garnishment judgment therein, now pending against the Liberty Trust and Savings Bank and the appeal thereon. It is understood, however, that in all of the assignments of the foreclosure, judgment and appeal, that the Heitman Trust Company shall not be liable for attorney's fees or court costs and expenses heretofore incurred and which have accrued or have been expended by the said Lewis Myers, or by anyone in his behalf, on said lawsuits or foreclosures prior to the time of the said assignment. Such assignments of the foreclosure proceedings and the

said loan being dated September 1, 1870, and the by its terms on September 1, 1871, in the sum of $[illegible].

2. If, however, and only in the discretion of the Kelsman Trust Company it can make a valid delivery of the assets of the estate of the said Lewis Myers, deceased, then, upon receipt of the said Lewis Myers appears to owe the said Trust Company, the said mortgage in the sum of [illegible] for a [illegible] dated May 17, 1871, to be a first, first, [illegible] be payable upon said loan [illegible] the same terms and conditions, [illegible] months, as set forth in the said [illegible] described. Provided, however, that the mortgage [illegible] either paid to or produced from the [illegible] Kelsman Trust Company, or provided in [illegible] is agreed that upon the payment of any interest [illegible] the said interest due or to become due, the said [illegible] cancelled and marked paid and that [illegible] mortgage, any payment or payments [illegible] Kelsman Trust Company [illegible] 1871, which shall be [illegible] to the balance of the trust Company shall [illegible] be held by the said [illegible].

3. Said Lewis Myers further agrees that if the present owners of the equity of redemption [illegible] in the trust deed known as the Nikin mortgage do not make [illegible] in the sole discretion of the Kelsman Trust Company, will be will deliver to the Kelsman Trust Company, upon the trust receipts, all of the securities and trust deed [illegible] for the purposes of foreclosure by the [illegible] Trust Company, at its own expense, however, and that the said [illegible] assign, without any cost to the said Kelsman Trust Company, or its nominee, all his right, title and interest in and to the foreclosure since now pending in the Circuit Court of [illegible] County, Illinois, under the title of [illegible] vs. [illegible], et al., to [illegible] that the Kelsman Trust Company, or its [illegible] may proceed in the foreclosure proceedings to the final entry [illegible] in, however, that said foreclosure proceedings [illegible] benefit of the said Lewis Myers only until [illegible] the said Nikin mortgage shall have been satisfied, with other [illegible] by the said Kelsman Trust Company, or [illegible] provided, and that upon the satisfaction of the mortgage [illegible] loan, the said foreclosure proceedings, together with the [illegible] thereby represented and/or the proceeds [illegible] the sale and conclusive property of the Kelsman Trust Company.

Said Lewis Myers further agrees to assign to Kelsman Trust Company all of his right, title and interest in and to the judgment by confession obtained in the Municipal Court of the City of Chicago, in the case of Myers v. Nikin, [illegible] said judgment was obtained on [illegible] of his rights, title and interest in [illegible] Kelsman Trust Company, now pending against the [illegible] the appeal thereon. It is understood, however, [illegible] assignments of the foreclosure, judgment and appeal, that the Kelsman Trust Company shall not be liable for attorney's fees or court costs and expenses heretofore incurred and which have a number of have been expended by the said Lewis Myers, or by myself in his behalf, on said lawsuits or foreclosures prior to the time of the said assignments. Upon assignments of the foreclosure proceedings and the

judgments aforesaid shall be made upon the understanding and agreement of the said Heitman Trust Company that it will pay to the said Lewis Myers all semiannual interest due under the terms of said mortgage, the same as if it were extended during said period of foreclosure and provided, further, that upon the issuance of a Master's Certificate of Sale and a Master's Deed thereon to the said premises, the said Heitman Trust Company shall substitute in exchange for the Rifkin Mortgage and/or trust receipt hereinbefore mentioned other 6% bonds or mortgages issued through or owned by the said Heitman Trust Company, which said substituted bonds or mortgages shall then be in good standing and not in default and shall be to the reasonable satisfaction of the said Lewis Myers.

Upon the assignment of the said foreclosure and judgments hereinabove described, the said Lewis Myers further agrees to execute a direction to the Straus National Bank and Trust Company to turn over possession of the premises hereinabove described to the Heitman Trust Company, or its nominee, without any cost or expense to the said Heitman Trust Company, together with the further direction to the Straus National Bank and Trust Company to turn over to the said Heitman Trust Company all funds or moneys collected by it and held from the premises hereinabove described.

4. Heitman Trust Company further agrees that in the event the said Rifkin mortgage is substituted, as hereinabove provided, with other bonds or mortgages, as aforesaid, the principal sum of the substituted mortgages or bonds shall not become due or payable at a date later than three years from the date of the substitution, unless the said Lewis Myers shall agree to such later date, and the Trust Company agrees to pay or purchase all bonds or mortgages, substituted for the said Rifkin mortgage upon default in the payment of principal or interest on said substituted bonds or mortgages, and such default continuing for thirty days, but the said Trust Company shall not be required to so pay or purchase said substituted securities until thirty days shall have elapsed after said due dates.

Provided, also, that in the event the said Heitman Trust Company fails or refuses to pay or purchase the substituted bonds or mortgages hereinabove mentioned upon their default in principal or interest, as the case may be, then the said Lewis Myers shall have the right to tender to the said Heitman Trust Company the entire $12,500 of substituted bonds or mortgages and the said Heitman Trust Company shall thereupon become obligated to pay or purchase the entire $12,500 of said substituted paper.

5. Heitman Trust Company further agrees to pay out of the funds deposited with it, or if no funds are deposited with it on the due dates, then said Heitman Trust Company agrees to purchase all interest coupons maturing on Drexel Mansions Bond Nos. 45 to 53, both inclusive, 56 to 75, both inclusive, and 81 to 153, both inclusive, and the said Heitman Trust Company hereby further agrees to pay out of the funds deposited with it for the purpose, or if no funds are so deposited with it on the due dates, then to purchase from the said Lewis Myers all of the above Drexel Mansion bonds maturing by their terms on May 1, 1932, and November 1, 1932, provided, however, that upon the maturity of the remainder of said Drexel Mansions bonds on May 1, 1933, said Lewis Myers and/or Lizzie Myers, his wife, their heirs, executors or assigns, shall agree to do and do hereby agree to extend the remainder of said bonds then unpaid for a period of five years from May 1, 1933.

It is understood that upon the payment of any interest coupons attached to said Drexel Mansions bonds, said coupons shall be stamped paid and cancelled.

During said extension period of five years from May 1, 1933, the said Heitman Trust Company agrees to pay or purchase any or all interest coupons as the same mature, if not otherwise paid, and that upon the due date of the said Drexel Mansions bonds by the terms of said extension agreement, said bonds shall not be paid, then said Heitman Trust Company agrees to purchase said bonds from the said Lewis Myers, or to substitute in place thereof, other bonds or mortgages issued or owned by the said Heitman Trust Company, which bonds or mortgages used as a substitute shall then be in good standing, not in default, and shall be to the reasonable satisfaction of the said Lewis Myers. The said Heitman Trust Company likewise agrees to pay or purchase any of the substituted bonds or mortgages after the same shall have been in default for a period of thirty days.

6. It is further agreed that all payments and/or purchases to be made shall be at par and any interest payments not made when and at the times required to be made shall draw interest after maturity at the highest rate at which it is lawful to contract, except, however, the Rifkin mortgage hereinabove described, upon which mortgage interest at the rate of 6% only shall be payable from the date of its maturity, to-wit, September 1, 1931.

7. It is further agreed that in the event default is made by the Heitman Trust Company in the substitution, purchase or payment of any of the securities hereinabove mentioned, and it then becomes necessary for the said Lewis Myers to file a bill to foreclose upon said securities for the purposes of protecting his interests thereunder, then and in such case only, the securities purchased or paid by the Heitman Trust Company of that issue foreclosed, theretofore, shall be subordinated to the securities owned by the said Lewis Myers and upon which that foreclosure shall be based.

8. The right is reserved in this agreement to the Heitman Trust Company to purchase any or all of the securities hereinabove mentioned, or any or all of the securities substituted therefor, upon payment to the said Lewis Myers of cash for said securities at par, plus accrued interest, upon giving to the said Lewis Myers thirty (30) days' prior notice of said intention to purchase.

9. It is also agreed that wherever the words 'Trust Company' appear herein, it shall be considered to include successor or successors, and that this agreement shall be binding also upon the heirs, executors, administrators, and/or trustees of the said Lewis Myers, but shall not extend to his assigns.

In witness whereof, Heitman Trust Company has caused this instrument to be executed by its President and Secretary and its corporate seal to be hereunto attached, and the said Lewis Myers has hereunto affixed his hand and seal the day and year first hereinabove written.

Heitman Trust Company
By: F. P. Heitman, Pres.

(Seal)
Attest:
Philip C. Lindgren, Secy.
Lewis Myers (Seal)"

It is understood that upon the payment of any interest coupon attached to said second mortgage bonds, the said coupons shall be stamped paid and cancelled.

During said extension period of five years from May 1, 1919, the said Heitman Trust Company agrees to pay the interest on any or all interest coupons on the said bonds, if not otherwise paid, and also upon the due date of the said second mortgage bonds by the terms of said extension agreement, said bonds shall not be paid, then said Heitman Trust Company agrees to purchase said bonds from the said Lewis Myers, or to substitute in place thereof, other bonds or mortgages owned or held by the said Heitman Trust Company, which bonds or mortgages used as a substitute shall then be in good standing, not in default, and shall be to the reasonable satisfaction of the said Lewis Myers. The said Heitman Trust Company likewise agrees to pay or purchase any of the substituted bonds or mortgages after the same shall have been in default for a period of thirty days.

6. It is further agreed that all payments and/or purchases to be made shall be at par and any interest payments not made when and at the times required to be made shall draw interest after maturity at the highest rate at which it is lawful to contract, except, however, the [illegible] so substituted, upon which mortgage interest at the rate of 6% only shall be payable from the date of its maturity, to-wit, September 1, 1919.

7. It is further agreed that in the event default is made by the Heitman Trust Company in the substitution, purchase or payment of any of the securities hereinbefore mentioned, and it then becomes necessary for the said Lewis Myers to file a bill to foreclose upon said securities for the purpose of protecting his interests thereunder, then and in such case only, the securities purchased or paid by the Heitman Trust Company of that issue foreclosed, therefore, shall be subordinated to the securities owned by the said Lewis Myers and upon which that foreclosure shall be based.

8. The right is reserved in this agreement to the Heitman Trust Company to purchase any or all of the securities hereinabove mentioned, or any or all of the securities substituted therefor, upon payment to the said Lewis Myers of cash for said securities at par, plus accrued interest, upon giving to the said Lewis Myers thirty (30) days' prior notice of said intention to purchase.

9. It is also agreed that wherever the words "Trust Company" appear herein, it shall be construed to include its assigns or successors, and that this agreement shall be binding upon the heirs, executors, administrators, and/or assigns of the said Lewis Myers, but shall not [illegible].

In witness whereof, Heitman Trust Company has caused this instrument to be executed by its President and Secretary and its corporate seal to be hereunto attached, and the said Lewis Myers has hereunto affixed his hand and seal the day and year first hereinabove written.

Heitman Trust Company
By: F. E. Heitman, Pres.

(Seal)
Attest:
Emilie E. Lindgren, Secy.
Lewis Myers (Seal)"

When the Rifkin mortgage was defaulted in August, 1931, defendant failed to comply with its guarantee agreement of September 22, 1926, by which it had undertaken to repurchase the defaulted issues at par plus accrued interest. Accordingly, plaintiff instituted suit in the municipal court to recover the $12,500 and interest due on bonds held by plaintiff. This suit was settled by the foregoing agreement of June 10, 1932. The Drexel bonds matured May 1, 1933. Shortly thereafter defendant presented to plaintiff for his approval a form of agreement extending the bonds, in the sum of $68,500, from May 1, 1933, to May 1, 1938, with interest at 3% instead of 6%. When plaintiff refused to consent to the extension upon the terms suggested, defendant failed to pay the principal of the bonds which had matured May 1, 1933, aggregating $46,500, and also the interest that subsequently fell due November 1, 1933. However, immediately after the execution of the settlement agreement of June 10, 1932, defendant paid plaintiff $4,486.74 on the Drexel bonds and also paid the accrued interest on the Rifkin mortgage. At the same time plaintiff assigned to defendant all his interest in the Rifkin mortgage, the judgment, his interest in the garnishment suit, and permitted attorneys for defendant to be substituted in the Rifkin foreclosure proceeding. Thereafter defendant prosecuted the foreclosure suit to the point where the master had filed his report in October, 1933, but no decree was ever entered.

Defendant takes the position that the first guarantee agreement of September 22, 1926, was executed subsequent to the stock purchase agreement bearing the same date, and that there was no consideration for the undertaking to repurchase or guarantee the bonds given plaintiff in exchange for his stock. A careful reading of the contract of June 10, 1932, discloses the fallacy of this conten-

tion, because in that agreement plaintiff gave some rights, including a judgment in the municipal court, the garnishment proceeding and his right to foreclose the Rifkin mortgage. All of these were valuable rights, and constituted a sufficient consideration for the agreement of June 10, 1932. Whether or not the contract of September 22, 1926, was of itself supported by a good consideration, the subsequent agreement and partial payments thereunder superseded all the former transactions.

Defendant's answer to the original complaint interposed only the defense of ultra vires. Obviously this was not a good defense, as the master held, because in September, 1926, when the transactions in controversy were initiated, defendant was incorporated under the name of Heitman Bond & Mortgage Company, and was engaged solely in the purchase and sale of bonds and was enabled under its charter and under the statute to repurchase its own bonds. The defense of ultra vires was supplemented by averments that Fred P. Heitman was not authorized by the corporation to purchase plaintiff's stock, nor to guarantee the payment of bonds given in exchange for the stock, and the defense of ultra vires was renewed upon the theory that subsequent to September 22, 1926, the name of the corporation had been changed to Heitman Trust Company and its charter amended so as to permit it to act as trustee, and it is then claimed that under the theory of Knass v. Madison & Kedzie State Bank, 354 Ill. 554, it is against public policy for the trust company to agree to repurchase its own bonds. It is argued that since the agreements of September 22 and 23, 1926, and the letter of August 3, 1931, were issued without authority of the corporation and in derogation of its powers as a trust company, the contract of June 10, 1932, which purports to settle the transactions covered by the earlier agreements, was also invalid and unenforcible. Under the

Knass case it was held that an agreement by a bank to repurchase at a specified price mortgage bonds sold by it is not within the scope of a general banking business, as that term is commonly used, and that guaranteeing such bonds is not within the powers conferred on banks by the banking act nor a necessary incident to the powers granted. The decision rests upon the theory that for the protection of bank depositors, as such, an agreement to repurchase may jeopardize or impair the deposits of the bank, resulting in injury to the depositors and the public. The decision is clearly not applicable to the character of the business transacted by Heitman Bond & Mortgage Company, the predecessor of defendant, nor to the Heitman Trust Company, which was not engaged in the banking business. All the transactions out of which this controversy arose preceded the change of the corporation to the Heitman Trust Company, and the amendment of its charter, and therefore its authority to do the various things which defendant contends were ultra vires date back to the original corporation. Moreover, we perceive no reason why a trust company may not settle a litigated matter by agreeing to pay with securities it owns and guarantee the payment of such securities. Counsel for defendant concede that it may do so, but argue that the ultra vires acts arose through agreement of the trust company to pay at maturity the obligations of other persons. The principle which forbids banks to do this is based upon the policy of the law which does not permit deposits of a bank to be jeopardized by such undertaking, but the Heitman Trust Company was not a bank and therefore, in our opinion, the rule of law invoked is not applicable to the circumstances of this case.

Sec. 4 of "an act for the protection of bank depositors," (chap. 38, par. 64, p. 1119, Smith-Hurd Revised Statutes, 1935) cited in the Knass case, reads as follows:

"Sec. 4. It shall not be lawful for any savings bank, individual or individuals doing banking business, banking

company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits or trust funds could be jeopardized or impaired shall be null and void."

In our opinion the only institution entitled to the protection of this section is one doing a banking business, and not merely a trust company. The distinction between the two is clearly shown in 7 Corpus Juris 881, sec. 970, as follows:

"The distinction between a bank and a trust company is well defined. The powers of the trust company depend on the terms of its charter, of course, but they are not banking powers. The trust company, like the savings bank, pays interest on deposits, but its deposits are strictly loans, not subject to check. It cannot issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its dealings. In directions that are not akin to banking, its powers are much broader and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution nor lay its officers liable to prosecution for violating the banking laws."

The defense that Heitman was not authorized to make these various agreements, and that the transactions were not approved by the directors, are not sustained by the record. Under the by-laws, as amended, Heitman was empowered to "perform the usual duties pertaining to such officers in similar mercantile corporations," and it was specifically provided that any stockholder desiring to sell his stock had to first offer the same for sale to the corporation at the book value as shown by the audit for the preceding year. We think this provision empowered Heitman to enter into an agreement for the purchase of plaintiff's stock and to provide the means of payment. It appears from the evidence that Heitman owned 80% of the total capital stock of the corporation, and that he and Lindgren "practically ran the business in all its details," and that the directors "left matters of contracts and business management up to them." In addition to these circumstances five of the directors

purchased plaintiff's stock after the corporation had acquired the same, and they must have known that it was part of the stock purchased from plaintiff and acquiesced in the transaction.

Through the various transactions between these parties plaintiff parted with 404 shares of his stock in the Heitman Bond & Mortgage Company, which was at the time a prosperous concern. Under his stock sales agreement he was entitled to receive cash according to the by-laws of the corporation. He was given bonds which were guaranteed in the subsequent agreement. Whether the so-called altered agreement was made currently with the stock sales agreement, or not, it is certain that they were both made in September, 1926, and we are convinced that these two contracts, as well as the agreement of September 23, 1926, were part of the same transaction. If any alterations were made in the second agreement it was not a fraudulent alteration but one of which Fred P. Heitman had full knowledge and to which he acquiesced. It stands to reason that since plaintiff, being entitled to cash for the sale of his stock, would not have accepted bonds without some kind of a guarantee that the bonds would ultimately be paid, and that is precisely what Heitman Bond & Mortgage Company, and later the Heitman Trust Company, undertook to do. It received $286 in cash for each of the shares except 25, for which it received $300, representing a profit. The result reached by dismissing complainant's bill would be manifestly inequitable and unjust, and would leave defendant in the position of having received cash for the stock which it had acquired from plaintiff and having given him some worthless bonds in exchange for stock in the corporation, which was prospering at the time he parted with his stock and paying substantial dividends. In addition to these circumstances the corporation made a commission on the sale of the bonds, and certainly was the gainer on the entire transaction.

The master to whom this cause was thrice referred apparently gave the evidence and the questions involved careful consideration. This appears from all of his reports, and we do not see, under the facts and equities of the case, how he could have fairly reached any other conclusions. There was no merit to the original defense, and those interposed by the amended answer were highly technical and appear to have been afterthoughts. The chancellor was therefore not justified in sustaining defendant's exceptions to the master's reports and in dismissing the bill for want of equity. The decree of the superior court is reversed and the cause is remanded with directions that a decree be entered in accordance with the findings and recommendations of the master.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

38903

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LOUIS G. QUIGLEY, administrator of the estate of Harley D. Warner, deceased,
Appellant,

v.

FRANK E. MERRILL et al.,
Defendants.

THE NORTHERN TRUST COMPANY, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 620

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal is now before this court on rehearing granted.

Plaintiff filed a complaint consisting of five counts against certain individuals who had executed a trust indenture designating the Northern Trust Company as trustee. The trustee executed a note for $30,000, guaranteed by one of the individuals, and it is alleged in these counts that the parties to the trust indenture, other than the Northern Trust Company, were copartners and liable on the guarantee as such, but those counts and those questions are not now before us.

The complaint was ultimately supplemented by an additional count, VI, under which plaintiff joined the Northern Trust Company as defendant and sought to hold it individually liable on the note. A motion to dismiss the additional count on the ground of legal insufficiency was allowed by the court, and this appeal followed. The sole question thus presented for determination is whether count VI sufficiently sets forth a cause of action against the Northern Trust Company in its individual capacity.

Briefly stated, it is alleged in count VI that plaintiff is the duly appointed, qualified and acting administrator of the estate of Harley D. Warner, deceased; that January 12, 1929, the Northern Trust Company executed and delivered its certain promissory note in the principal sum of $30,000, payable to bearer one year after date, and signed as follows: "The Northern Trust Co., a corporation of Illinois, as Trustee under Trust Deed dated March 4, 1927, known as Trust No. 6761, By A. B. Caswell, Vice Pres." The note bore on its face, beneath the signature, the following notations: (1) "Principal Note No. One. This is to certify that this is the Principal Note described in a Trust Deed to Chicago Title & Trust Company, Trustee, dated Jan. 12th, 1929. Register No. M 39604. CHICAGO TITLE & TRUST COMPANY, Trustee, By W. C. Taggart, Assistant Treasurer," and (2) "The Northern Trust Company executes this instrument as trustee, as aforesaid, and it is not to be held liable in its individual capacity in any way by reason of this instrument."

It is further alleged that on or about January 12, 1929, plaintiff's intestate became the owner of said note, for value, and was the owner thereof at the time of his death, and that it became a part of his estate and passed into the hands of plaintiff as administrator; that the words "as Trustee under Trust Deed dated March 4, 1927, known as Trust No. 6761," appearing on said note, are merely words of description and constitute no part of the signature to said note; that the words "The Northern Trust Company executes this instrument as trustee, as aforesaid, and is not to be held liable in its individual capacity in any way by reason of this instrument," appearing after the signature on said note, are insufficient to relieve defendant from individual liability, and that there was no agreement made by plaintiff's intestate to accept said

words as a part of said agreement, nor any agreement or other contract of plaintiff's intestate to release the Northern Trust Company from its individual liability on said note.

To this count of the complaint defendant filed its written motion to dismiss, and as ground therefor specified the following:

(1) "It appears from an inspection of the note attached to plaintiff's complaint, and which by reference is made a part of said count VI, that this defendant executed said note in its capacity as trustee under trust agreement dated March 4, 1927, and known as Trust No. 6761, and that this defendant did not execute said note in its individual corporate capacity and is not individually liable on said note."

(2) "It clearly and definitely appears from an inspection of said note and the trust deed securing the same, set forth in plaintiff's complaint, that this defendant was executing both said note and said trust deed as trustee, and that said note clearly shows that this defendant stipulated therein that it should not be individually liable to the plaintiff, or to the holder of said note, in its individual capacity."

Plaintiff takes the position that the words "As Trustee under said trust agreement, dated March 4, 1927, known as Trust No. 6761," are merely words of description and constitute no part of the signature, and that the bank cannot release itself from individual liability by affixing the stamp hereinbefore set forth. It is argued that a trustee is personally bound by his contracts, unless he exacts an agreement from the other party to look solely to the trust estate. Sec. 20, par. 40, chap. 98, Illinois State Bar Stats., 1935, of the Negotiable Instrument Law, and various authorities are cited to support these contentions.

"Sec. 20. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from from personal liability."

The effect and construction of this section of the statute was carefully considered and discussed in Tampa Investment and Securities Co. v. Taylor, 272 Ill. App. 541. In that case plaintiff sued to recover on two promissory notes signed "Orville Taylor, R. A. Demeter, as

trustees." In the course of the trial Taylor, who had appealed, offered to prove that pursuant to an oral agreement with one of the indorsers the notes had been executed in behalf of certain individuals and that he was not to become personally liable thereon. The court refused the tender of parol evidence, but upon appeal the cause was reversed and remanded with directions that defendant be permitted to introduce evidence in support of his defense. In an exhaustive opinion filed in that case the court reviewed the historical reasons leading up to the enactment of sec. 20 of the Negotiable Instrument Law, and pointed out that the language of that section was largely determined by what the bar generally believed to be the unjust result reached in the case of Roger Williams National Bank v. Groton Mfg. Co., 16 R. I. 504, where the trustees of an estate, acting in conformity with the directions of the testator, were held personally liable on a promissory note they had indorsed as trustees. Brannan's Negotiable Instruments Law, 4th ed., p. 164, was cited to show that the commissioners and draftsmen of the Negotiable Instrument Law intended by the enactment of sec. 20 "to clear up the unnecessary and unpardonable confusion caused by the failure of some of the courts to exercise a little common sense and to recognise mercantile usage," and the court concluded that section 20 "changed the previous rule that a name followed by a designation as to some relationship to another, would be considered only descriptio personae, and the maker thereof personally liable." Numerous cases in various jurisdictions are cited and discussed in this decision. As to Powers v. Briggs, 79 Ill. 493, and Trustees of Schools v. Rautenberg, 32 Ill. 310, relied on by plaintiff, it was pointed out that these cases were decided long before sec. 20 was enacted; that Wolf v. Schiff Trust & Savings Bank, 276 Ill. App. 527, involved no discussion of the question under consideration, and that Taylor v. Davis, 110 U. S. 330, did not involve a

negotiable instrument and was decided long before the enactment of sec. 20. From the various decisions cited in Tampa Investment and Securities Co. v. Taylor, supra, the court concluded that while the decisions interpreting the statutes in various states are not entirely in harmony, the rule usually followed is apparently to the effect that where the trustee has authority, as between the parties or those taking the instruments without notice, it may be shown by parol that the principal for whom the trustee was assuming to act was known, and that where the note discloses the name of the principal the signers are not individually liable; that so far as innocent purchasers for value are concerned, however, the representative character of the party must be disclosed on the face of the note.

Under the Tampa case and the authorities cited therein, defendant should be given an opportunity to show by parol evidence, if it can, that the principal for whom it was assuming to act as trustee was known or could have been ascertained by inquiry, and that it is not individually liable on the note. Since the matter was presented to the trial court on a question of pleading, however, it was error to sustain the motion to dismiss the complaint.

It is urged also by plaintiff that a trustee is personally bound by his contracts unless he exacts an agreement from the other party to look solely to the trust estate. O'Connell v. Horwich, 284 Ill. App. 554, a recent decision of this court, and other cases are cited to support this contention. In this connection it is argued that the trustee becomes personally liable unless he stipulates in so many words that the holder of the note is to look solely to the trust estate for payment, and that an inspection of the note in question fails to show any agreement between the parties that the payee is to look solely to the trust estate. It is undoubtedly a

negotiable instrument and [illegible] of sec. 20. From the various [illegible] cited in [illegible] and Commission Co. v. [illegible] supra, the court concluded that while the decisions [illegible] in various states are not uniformly in harmony, [illegible] apparently to the effect that [illegible], or between the parties or those taking [illegible], it may be shown by parol that the principal [illegible] to act was known, [illegible] the name of the principal [illegible] innocent purchasers for value [illegible] the representative character [illegible] note.

Under the Kane case and the authorities cited therein, defendant should be given an opportunity to show by parol evidence, if it can, that the principal [illegible] to act as trustee was known or could have been ascertained by inquiry, and that it is not individually liable on the note. Since the matter was presented to the trial court [illegible], however, it was error to sustain the motion to [illegible] the complaint.

It is urged also by plaintiff that [illegible] trustee is personally bound by his contracts unless he [illegible] from the other party to look solely to the trust estate. [illegible] v. [illegible], 204 Ill. App. 554, a recent decision of this court, and other cases are cited to support this contention. [illegible] it is argued that the trustee becomes personally liable unless he [illegible] the trust estate for payment, and that an inspection of the note in question fails to show any agreement between the parties that the payee is to look solely to the trust estate. It is undoubtedly a

rule of trusts, announced in many decisions, that where a trustee enters into a contract he is personally bound unless he exacts an agreement that he is not to be personally liable and that the other party is to look solely to the trust estate, but it would be absurd to apply that rule to the facts of this case, in view of the plain stipulation on the face of the note that the Northern Trust Company is not to be personally liable and other notations plainly indicating that it signed the instrument as trustee, giving sufficient information on the face of the note to afford the holder full opportunity of ascertaining the particulars of the trust agreement and the beneficiaries of the trust. Moreover, we think that in the signature of the note by the trustee, together with the notations that follow indicating that the Northern Trust Company is not to be held personally liable, there is necessarily implied the stipulation that plaintiff's intestate, who became the holder of the note, had to look to the trust estate, and it was not necessary to make the specific recital in so many words that the party dealing with the trustee was to look solely to the trust property. In order to apply the rule contended for by plaintiff, we would be obliged to disregard sec. 20 of the Negotiable Instrument Law, our own decision in the Tampa case, supra, and other authorities cited in defendant's brief holding otherwise.

Lastly, it is urged by plaintiff that the rubber stamp indorsement appearing after defendant's signature on the note, purporting to release it from individual liability, is a nullity. Current authority does not sustain this contention. It was said in Economy Fuse Co. v. Standard Electric Co., 359 Ill. 504;

"Notations or memoranda placed on the back of a check contemporaneously with the execution of the instrument, with intention of making them a part of the contract for payment of money, constitute as much a part of the instrument as though incorporated in the body thereof. In the absence of evidence concerning the intention of the maker in placing such notation on the back of a

check it will be presumed to have been made contemporaneously with the instrument and as a part of it and will be given effect as if made in the body thereof."

In Scholbe v. Schuchardt, 292 Ill. 529, the following marginal memorandum appeared on the face of the note: "This note is given to secure 5,000 shares of Regina stock." In an action on the note the proof indicated that the words were affixed at the time the instrument was executed and delivered, and it was held that (pp. 534-35):

"Those words must be considered the same as if they had been written over the signature of Max Schuchardt and as a part of the instrument itself. The weight of the authorities is undoubtedly to the effect that such words are as binding on the parties to the instrument as if they were incorporated in the body of it before it was signed, and that is also the holding of this court."

To the same effect was Van Sandt v. Hopkins, 151 Ill. 248, where a similar principle was announced.

For the reasons stated the order of the superior court dismissing count VI of the complaint for insufficiency is reversed and the cause is remanded with directions that defendant be required to plead to this count of the complaint, and that further proceedings be had not inconsistent with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

38951

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CHARLES DeLEUW & COMPANY,
a corporation,
Appellee,

v.

VILLAGE OF MIDLOTHIAN,
a municipal corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

239 I.A. 520

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for engineering services rendered the Village of Midlothian under a written contract of employment. The cause was tried without a jury, resulting in findings and judgment for plaintiff of $9,651.25, from which defendant appeals.

Briefly stated, the complaint alleges that October 18, 1927, defendant, a municipal corporation, entered into a written contract with L. F. Kelker, Jr., and Charles DeLeuw, copartners, plaintiff's predecessors, under which the latter agreed to render all engineering services in connection with the installation of an improved water system and for a combination sanitary and storm water sewer within the Village of Midlothian. A copy of the contract, which outlines the services to be rendered by plaintiff and stipulates the compensation to be received, is incorporated in the complaint.

With reference to the improved water system it is alleged that, by direction of the board of local improvements of the village, plaintiff prepared necessary plans, estimates and an originating resolution covering the proposed improvement and presented it to the board, who adopted the plan; that a public hearing was held March 20, 1928, pursuant to the resolution, and thereafter the

board approved a draft of the ordinance for the proposed improvement and recommended passage thereof to the trustees of the village, who passed the ordinance, and March 27, 1928, caused a petition to be filed in the County court of Cook county for the levy of a special assessment to pay the cost of the improvement, which according to estimates prepared by plaintiff amounted to $72,485; that proceedings were had in the county court pursuant to passage of the ordinance, and June 11, 1928, the board directed plaintiff to prepare an advertisement for bids, returnable July 3, 1928; that plaintiff did all the work required under its contract and became entitled to be paid for services in accordance therewith. It is alleged that June 29, 1928, the village caused all orders to be vacated, and thereafter directed plaintiff to prepare new plans, estimates and a resolution for similar improvements, differing only in certain particulars; that plaintiff rendered the necessary services under the new plan, which was adopted July 6, 1928; that after public hearings had July 17 and August 7, 1928, the board passed a resolution adhering to the plan, and recommended passage of an ordinance by the trustees, who passed the required ordinance, and September 10, 1928, caused a new petition to be filed in the county court for the levy of a special assessment to pay for the cost of the improvement; that an order of default and confirmation of the entire assessment roll was thereafter, October 18, 1928, entered in the county court, except as to certain property owners who objected thereto, and February 21, 1930, defendant caused the second petition to be dismissed, by reason whereof plaintiff became entitled to additional compensation under its contract.

With reference to the proposed construction of a system of combined sanitary and storm water sewers for a portion of the village, the complaint alleges that plaintiff was directed to make complete surveys, borings, plans, estimates and to prepare an originating

résolution; that these services were rendered and acted upon by the board of local improvements and the village trustees, and carried through to the filing of the petition in the County court of Cook county, where proceedings were had resulting in the default and confirmation as to all assessments except certain parcels of property for which objections had been filed; that March 8, 1929, defendant allowed the petition in the county court to be dismissed by reason whereof plaintiff became entitled to be paid for its services.

It is alleged further that July 2, 1928, the village dispensed with the services of plaintiff as engineers of the village and employed other engineers; that when bills for services rendered were presented to the village defendant refused to recognize any of plaintiff's claims, and finally, October 1, 1931, defendant notified plaintiff that the contract was terminated, in accordance with the terms thereof, but refused to pay plaintiff for any of the services theretofore rendered.

Upon hearing of the cause it was stipulated that the facts set forth in the complaint were true, with the exception that defendant reserved the right to show that (1) the work for which plaintiff claimed compensation was not performedin good faith; (2) that the value of the services performed was not admitted; and (3) that it was not agreed that the assessment proceedings were dismissed by defendant, as alleged.

It is urged by defendant that the contract sued on required a prior appropriation to meet the expenses thereof, in accordance with part 1, sec. 4, art. 7 of the Cities and Villages act, and no appropriation having been made, the contract is void and there can be no recovery thereon. The statute relied on (Illinois State Bar Stats. 1935, chap. 24, part 1, sec. 4, par. 95, p. 356) provides as

[illegible] the board of local improvements [illegible] [illegible] conducted through an [illegible] [illegible] in the county [illegible] of Lake County, Ohio [illegible] [illegible] and maintenance [illegible] property for which obligations have been issued [illegible] Lake County allowed the petition in the county court to be maintained by reason thereof obligations have [illegible] to be paid [illegible] taxation.

It is alleged further that [illegible], 1966, the village [illegible] with the services of [illegible] employed other [illegible] to the village [illegible] claims, and finally, [illegible] that the contract was terminated, [illegible] but refused to pay plaintiff for any of the [illegible] rendered.

Upon hearing of the cause [illegible] not [illegible] in the complaint [illegible] but reserved the right to [illegible] (1) the [illegible] claimed connection [illegible] of the services performed [illegible] was not required that the government [illegible] defendant, as alleged.

It is urged by defendant that the contract [illegible] a public appropriation to meet the [illegible] with part I, sec. 6, art. V of the Ohio [illegible] appropriation having been made, the contract is void and [illegible] be a recovery thereon. The statute relied on (Ohio [illegible] Rev. Code, 1958, chap. 54, part I, sec. 6, par. (B), [illegible]

follows:

"No contract shall be hereafter made by the City council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided. * * *"

DeKam v. City of Streater, 316 Ill. 123, is cited by defendant as construing the statute in accordance with plaintiff's contention. In that case the city entered into a contract with an engineer to design a certain sewer system. No appropriation had been made for the compensation to be paid the engineer under the terms of his contract. The services were rendered as contemplated and the city desired to pay him, but a taxpayer intervened and procured a decree restraining the city from paying any sum for the services of the engineer. Upon appeal the decree was sustained, the supreme court holding that inasmuch as no appropriation had been made in accordance with sec. 4 of art. 7 of the Cities and Villages act, the contract was one expressly prohibited by statute and therefore void.

Defendant concedes, however, that the foregoing statute and the authority cited is applicable only to contracts payable out of the general corporate funds, and it therefore becomes important to determine whether the moneys due for the services rendered by plaintiff under the contract in question were payable out of the general corporate funds, or solely out of a fund to be raised by special assessment. The contract is quite lengthy, and a consideration of its various provisions requires that it be set out in full, as follows:

"CONTRACT

FOR ENGINEERING SERVICES

Articles of agreement between the Village of Midlothian, a municipal corporation of the County of Cook and State of Illinois,

acting by and through its President and the Board of Trustees (hereinafter designated the 'Village' which term shall include any officer or Board of said municipal corporation having power to represent it, or act for it, in relation to any part of the subject matter of this contract) and Kelker, DeLeuw & Company, a partnership of Chicago, Illinois (hereinafter designated the 'Engineers') WITNESSETH:

In consideration of the agreements hereinafter set forth, it is mutually agreed as follows:

ARTICLE I.

EMPLOYMENT OF ENGINEERS

That the Village hereby employs the Engineers to render the services hereinafter set forth and all other engineering services necessary to the proper completion of all improvements to be undertaken by the Village, which services the Engineers shall perform.

ARTICLE II.

SURVEYS AND PLANS.

The Engineers shall make an investigation and survey of all districts covered by proposed improvements which shall include the running of all levels and making all subsoil investigations that may be necessary to enable them to establish satisfactory lines and grades, to which said works shall be constructed. They will advise with the Village in regard to the extent of the improvements, the type of materials and appurtenances to be used in connection therewith.

ARTICLE III.

SERVICES.

When so directed by the Village the Engineers shall make detailed estimates of cost, attend hearings, and after said hearings, will revise the estimates as may be directed by the Village, for each improvement. The Engineers shall make recommendations, which shall be based upon the survey and estimates hereinabove mentioned. After passage of the ordinance the Engineers shall assist the attorney for the Village in all matters requiring engineering services in the preparation for and prosecution of any and all condemnations and/or proceedings to secure confirmation of special assessments or special taxes in court.

The Engineers shall make all necessary plans of the work to be done. They shall make such detailed plans on a large scale as may be necessary or desirable for the President and Board of Trustees. The Engineers shall prepare specifications outlining the work to be done, and submit same to the Village for approval. The Engineers shall also prepare proposal blanks and forms for advertisement, and shall be present and advise with the Village at the time of letting the contracts.

ARTICLE IV.

SUPERVISION.

The Engineers shall supervise the construction of said

improvements to see that all clauses of the specifications are complied with and that satisfactory progress is made. For that purpose they shall employ and pay a competent Resident Engineer together with such assistants and inspectors as may be necessary who shall be on the work from beginning to completion.

ARTICLE V.

PREPARATION OF ESTIMATES.

The Engineers shall prepare estimates of work actually constructed and in its permanent place, and on or before the first Monday of each month shall make a report to the Village showing the amount of work done during the previous month and the total amount done to date. The Engineers shall, in general, discharge all administrative duties connected with the engineering work.

ARTICLE VI.

DUTIES OF VILLAGE.

The Village agrees to co-operate with the Engineers in the prosecution of this contract and to further the completion of the contract by every possible means.

ARTICLE VII.

FEES AND PAYMENTS.

The Village shall pay to the Engineers as compensation for their services hereunder from time to time as said services are being performed, the following amounts:

1. On the first $100,000 or fraction thereof of the cost of each improvement a fee equal to five per cent (5%) of the actual cost of the improvement;

2. On all amounts over $100,000 and less than $200,000 of the cost of each improvement a fee equal to four and one-half percent (4 1/2%) of that portion of the actual cost of the improvement; and

3. On all amounts over $200,000 of the cost of each improvement a fee equal to four percent (4%) of that portion of the actual cost of the improvement, payable as follows:

(a) Upon the letting of any contract a sum equal to fifty percent (50%) of the fee;

(b) During the progress of the work, as and when payments are made to the contractor, a sum equal to fifty percent (50%) of the fee proportioned on the amount due and payable for work done, until the full fee has been paid, it being understood that the Engineer shall in no event receive in the aggregate more than the above named percentages on the actual cost of any improvement as compensation for all services performed hereunder in connection with such improvement;

(c) In the event that any improvement is postponed, it is hereby stipulated that such postponement shall in no way affect this contract, and no portion of the fee herein stipulated to be paid, shall be due and payable until the letting of the contract, as hereinabove set forth.

(d) Payment to be made in cash, or in special assessment

or special tax vouchers bearing interest at the rate of six percent (6%) per annum; provided that payment shall not be made in such vouchers, and acceptance of them by the Engineers shall not constitute payment, unless and until a valid special assessment or special tax is levied for the payment thereof and a contract is duly let and work started on the construction of said improvements.

ARTICLE VIII.

TERMINATION OF CONTRACT.

This contract may be terminated by either party hereto by giving a fifteen (15) day notice in writing to the other party of its intention to cancel said contract. In the event of cancellation under this Article, payment to the Engineers for services rendered shall be made on a prorata basis, and in case agreement as to claims for services rendered cannot be reached by the parties hereto, then within ten (10) days each party shall name a representative and said representative shall select a third member of an arbitration board, and the decision of said board regarding any claim or claims shall be final and binding upon both parties.

* * *

Executed in duplicate on this 18th day of October, 1927.

Village of Midlothian,
By J. W. Hamilton,
President of the Board of
Trustees.

Attest:

William R. Schallerer,
Village Clerk.

(Corporate Seal)

Kelker, DeLeuw & Company
By: R. F. Kelker, Jr."

It will thus be seen that article 1 of the agreement specifies the services necessary to the proper completion of all improvements to be undertaken by the village. Article III refers to detailed estimates of cost, attending hearings, making recommendations, assisting the village attorney in matters requiring engineering services, in preparation for and prosecution of condemnation, special assessment and special tax cases in court. Article VII, providing for payment of these services, contemplates that "payment shall be made in cash or in special assessment or special tax vouchers," and not until contracts are let. Under the procedure followed in levying special assessments, the awarding of contracts follows the con-

firmation of the assessment, and the collection of the assessment follows the letting of the contract and the issuing of the first voucher to the contractor. It usually follows that when an assessment is put into collection a portion of the first installment is promptly paid, which gives the village sufficient cash to pay a considerable amount on account of expenses of the improvement. Par. (d) of article VII of the contract provides that cash may be used from the assessment collections to pay the engineer on account, and that special assessment vouchers may be used, and it specifies that the delivery of vouchers and acceptance thereof by the engineers shall not constitute payment unless and until the tax is levied, the contract is let and the work is started on the construction. This provision indicates that the vouchers were to be regarded as payment if the tax was levied, the contract let and the work started, and thereafter the village would no longer have the right to vacate the assessment, abandon the improvement and dismiss the proceeding. From these various provisions of the contract, it seems reasonably clear plaintiff was to be paid for its services from special assessment funds. Moreover, it appears from the record that the Village of Midlothian had but recently been organized and its assessed valuation was rather small. The improvements contemplated by the contract were estimated at some $800,000. The debt incurring power of the village was not sufficient to pay for the improvements by general taxation. The only conclusion to be drawn from these circumstances is that the improvements, including plaintiff's services, were to be derived by special assessment. This was the construction placed upon the contract by the trial court, and we think it was correct.

Plaintiff's counsel cite Gage v. Village of Wilmette, 230 Ill. 428, wherein engineers, not regularly employed by the city, were retained to do special work on certain improvements. In discussing the

compensation claimed by the special engineers, the court said (p. 435):

"For example, if a village does not have a regular engineer employed at a stated salary, such a man might be hired and paid for his special work on the improvement out of the funds raised by that assessment."

It is next urged that even assuming the contract was payable solely out of special assessment funds, still plaintiff cannot recover for the reasonable value of the engineering services rendered, because (1) the services performed were not rendered in good faith; (2) the originating special assessment ordinances relative to the two improvements were invalid and void, and therefore plaintiff acquired no rights by virtue of said ordinances; and (3) the fact that the special assessments in question were not levied was not the fault of the village. As to the first point, it is argued that when the engineering services were rendered the village had no water supply of its own, nor did it have any contract with any person or corporation by which the water could be supplied for use in any water mains to be constructed, and defendant's counsel say that, notwithstanding all these facts were known to plaintiff, it nevertheless proceeded to perform engineering services and accumulated charges against the village, when it was by no means certain that any benefit would accrue to the village through the services performed. We think it a sufficient answer to this contention to point out that the village of Midlothian was located in the sanitary district, adjoining the Village of Rosen, and that Chicago water from Lake Michigan had been brought to the boundary line of the village. Under sec. 26, par. 366, p. 1388, chap. 42, Illinois State Bar Stats., 1935, the Village of Midlothian, upon proper showing, had the right to water and by mandamus could compel delivery thereof into its mains. (City of Chicago v. Town of Cicero, 210 Ill. 290.) Under the circumstances plaintiff's good faith cannot be seriously

compensation [illegible]

(p. 455):

"The company, [illegible] village does not have [illegible] employed [illegible] **stated** [illegible] his special work on [illegible] one of [illegible] assessment."

It is most [illegible]

solely out of special assessment funds, [illegible]

payer for the [illegible]

because (1) the services [illegible]

(2) the engineering special assessment [illegible]

two improvements [illegible]

quired no rights by virtue of [illegible] and (3) the fact

that the special assessments in question [illegible]

the fault of the village. [illegible]

that when the [illegible]

water supply of its own, [illegible]

or compensation [illegible]

other means to [illegible]

notwithstanding all [illegible]

theless proceeded to perform [illegible]

charge against the village, [illegible]

any benefit would accrue to the [illegible]

formed. [illegible] think it a [illegible]

out that the village of [illegible]

trict, adjoining the [illegible]

Lake Michigan had been brought to the [illegible] village.

Under sec. 95, par. [illegible]

Stats., 1933, the village of [illegible]

the right to water and by ordinance [illegible]

into its mains. [illegible]

Under the circumstances [illegible]

questioned.

With reference to the second point, it is urged by defendant that the special assessment ordinance was invalid because no provision had been made for bringing a water supply into the village, and also because the village had no outlet for the proposed sewer system. Village of Gardner v. Christiansen, 321 Ill. 226, is cited. It is admitted that all legal objections in the special assessment proceeding concerning this water improvement were overruled by the county court on June 9, 1928, and thereafter the village voluntarily caused all orders in the proceedings to be vacated and the petition to be dismissed. Moreover, the Gardner case relied on by defendant was an appeal from a judgment of the county court holding the assessment invalid because the contract introduced in evidence in that case did not assure an elevated tank and a pump to transfer the water from the source of supply to the distribution system, but we do not understand that case as holding that the ordinance there was invalid. The village of Midlothian had express authority by statute to contract with the Sanitary District of Chicago as to sewers under par. 1146, sec. 1, chap. 24, Illinois State Bar Stats., 1935, and it could also, by proper proceedings, have obtained a supply of water for the village.

With reference to the third point, it is conceded by defendant that the special assessment proceeding in the county court was dismissed on motion of defendant, but it says that the village was fully justified in dismissing the proceeding because, under the authority of Village of Gardner v. Christiansen, supra, the proceeding was illegal and improper, on the ground that no water supply was available. As to the dismissal of the second special assessment proceeding, it is argued that the facts are somewhat different, and that the case was not dismissed upon the motion of the defendant, but upon legal objections of certain property owners because the village had no outlet for the sewer system contemplated. While it is true that there was no evidence

overlooked.

[illegible] that the [illegible] [illegible] view has been made [illegible] and also because the village has no [illegible] for the [illegible] system. [illegible]

It is contended that all legal objections in the original assessment proceeding have been [illegible] by the county court on June 5, 1922, and therefore the relators [illegible] caused all omissions in the proceedings to be [illegible] and the [illegible] to be dismissed. Moreover, the [illegible] and [illegible] [illegible] was an appeal from a judgment of the county court, [illegible] assessment invalid because the contract [illegible] in evidence [illegible] did not assure an adequate tank and a pump to [illegible] the water from the source of supply, to the [illegible], but it did not [illegible] stand that only one building [illegible] the village of Middletown had [illegible] with the sanitary facilities of [illegible] see, I, chap. 24, Illinois [illegible] Law, and it could [illegible] by proper proceedings, were obtained a majority of [illegible] the village.

With reference to the third point, it is conceded by [illegible] that the special assessment proceeding in the county court [illegible] justified in dismissing the petition, [illegible] of Village of [illegible] v. [illegible], supra, the proceeding was illegal and improper, on the ground that no [illegible] was [illegible], is to the dismissal of the second special assessment proceeding. It is argued that the first and the second differed, and that the [illegible] - misses upon the merits of the [illegible], but upon legal objections of certain property owners [illegible] the village [illegible] system contemplated. While it is true that there was no evidence

tending to show that an outlet had been provided for the sewage of the village, this omission was due to the failure of the village to make a proper showing that the village was located within the sanitary district, and could have made a contract with the district for disposing of its sewage. It was not the function of plaintiff's predecessors, who were engineers, to supply this proof. The attorneys for the village, who had charge of the proceeding, could easily have supplied the necessary evidence, and their failure or refusal to do so does not justify defendant in now arguing that the petition was dismissed because of the objections made.

Plaintiff argues that it may recover for services rendered even though the proceedings were dismissed, and its counsel cites the case of Gray v. City of Joliet, 287 Ill. 280, where, after reviewing the authorities, the court concluded as follows:

> "Without extending this discussion further, it is our convinction that while a city having a population of less than 100,000 may by ordinance, under the proviso to section 94, provide for the payment of the expense of levying an assessment from the fund produced by levying it, it cannot relieve itself from liability to pay the reasonable expenses incurred where the city itself voluntarily abandons and dismisses the proceeding before judgment of confirmation."

The record shows that July 2, 1929, the president and board of trustees of the village dispensed with plaintiff's services, employed other engineers and refused to recognize any claim on the part of plaintiff for the services rendered, necessitating this suit. It seems reasonably clear that the first proceeding in the county court was voluntarily dismissed by the village, and that the second proceeding was dismissed because the village refused or neglected to make a proper showing to overcome the objection of certain property owners. The Village of Midlothian had received and accepted the benefits of plaintiff's services, as engineers, and under the case of Murrie v. Harper, 249 Ill. App. 586, cited by plaintiff, we think it should be required to pay the value of the services in accordance with the

terms of the contract. In Anderson v. City of Highland Park, 276 Ill. App. 327, the court said, quoting from Chicago v. Pittsburg, C. C. & St. L. Ry. Co., 244 Ill. 220:

"'A City is not entirely exempt from all the rules of honesty and fair dealing that are applicable to individuals and private corporations. If a city may lawfully exercise a power, it may be equitably estopped to question the validity of its exercise on account of the manner in which it is done or the lack of required formalities, as right and justice require. * * *' Having accepted the benefits of the work of the plaintiff, it would be inequitable and unjust to permit the defendant to defeat the claim of the plaintiff, by relying on the ordinances."

A like expression is contained in Bunge v. Downers Grove Sanitary District, 356 Ill. 531, where attorneys sought to recover fees for services rendered in connection with sanitary district proceedings. The sanitary district had there decided to abandon the improvements, supposing the ordinances void. The court, however, held (p. 537):

"It has been repeatedly held by this court that where a special assessment proceeding is not carried to completion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the municipality cannot avoid payment by setting up the contingent nature of the contract but is liable out of the general fund. (Maher v. City of Chicago, 38 Ill. 266; Gray v. City of Joliet, 287 Ill. 230.)"

Lastly, it is urged that the court abused its discretion in refusing to permit defendant to plead the statute of limitations. This amendment was not filed until after the case had been submitted to the court, the evidence heard, the arguments made and the court had announced its decision. The amendment was apparently an afterthought, and was interposed as a speculative measure in the defense of its case. When it appeared that the court had found the issues in favor of plaintiff, the statute of limitations was interposed and urged as a defense. We think the court was entirely within its discretion in refusing to permit the amendment at that stage of the proceeding. Moreover, the contract between defendant and plaintiff's predecessors was not finally terminated until October 1, 1931, and this proceeding was instituted March 13, 1935, which

was within the five year period.

We find no convincing reason for reversal and therefore the judgment of the circuit court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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38977

JULIUS LUHRSEN, administrator of the estate of ALFRED L. MULLER, deceased,

Appellee,

v.

JOHN MARCUS and FRANK W. GLEN,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Julius Luhrsen, administrator of the estate of Alfred L. Muller, deceased, brought an action of trespass on the case against defendants for damages resulting in the wrongful death of his intestate through a collision between an automobile owned and driven by the administrator, in which his intestate was riding as a passenger, and a truck and trailer owned by Frank W. Glen and driven by John Marcus. Trial was had by jury, resulting in a verdict and judgment for $7,500. The cause is here for the second time on appeal, the first opinion having been filed, but not published in full, December 31, 1934 (Luhrsen, adm'r v. Marcus and Glen, 278 Ill. App. 628, opinion No. 37485).

The essential facts disclose that Glen was engaged in hauling freight between Chicago and various points. December 17, 1931, Marcus, a licensed chauffeur employed by Glen, left St. Louis with a truck and trailer some thirty-one feet in length, loaded with 6,000 or 7,000 pounds of freight. He spent the night at Mattoon, Illinois, and the following morning the generator on the truck burned out. It being Sunday, Marcus was unable to have it repaired, but he purchased a new battery en route and continued

JULIUS JUNGMAN, administrator of the estate of ALFRED [illegible], deceased,

Appellee,

v.

JOHN KNOWLES and FRANK [illegible],

Appellants.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

Julius Jungman, administrator of the estate of Alfred L. Muller, deceased, brought an action on tort case on the ground against defendants for damages resulting in the wrongful death of his intestate, through a collision between an automobile owned and driven by the administrator, in which his intestate was riding as a passenger, and a truck and trailer owned by Knowles [illegible] and driven by John Knowles. Trial was had by jury, resulting in a verdict and judgment for $7,000. The owner in error [illegible] the second time on appeal, the first opinion having been filed, but not published in full, December 21, 1934 (Jungman, adpt v. Knowles and [illegible], 274 Ill. App. [illegible], [illegible] v. [illegible]).

The essential facts disclose that [illegible] occurred in bustling traffic between Chicago and various points [illegible] November 27, 1931, Knowles, a licensed chauffeur employed by him, left at [illegible] with a truck and trailer some thirty-one feet in length, loaded with 8,000 or 7,000 pounds of freight. He spent the night [illegible] Bettsoon, Illinois, and the following morning the generator on the truck burned out. It being Monday, Knowles was unable to have it repaired, but he procured a new battery at [illegible] and continued

toward Chicago. About 11 o'clock in the forenoon he picked up a young men, named Martin Nadai. Marcus drove the truck northward at the rate of about 30 miles an hour until, and as he testified, he reached Monee, Illinois, around 4:40 in the afternoon. There he turned on the rear lights on the trailer, but because it was still twilight he did not turn on the headlights. He continued on his journey, and was proceeding north on route 49 when the engine began to sputter, due to a shortage of gasoline. He thereupon pulled the truck over to the edge of the outer lane, stopped and set the brakes. The shoulder of the highway was soft and muddy and would not support the truck, and it was therefore necessary to park on the right hand side of the concrete pavement. The truck was then about two miles north of Monee, and approximately 1,800 feet beyond route 50, which joins route 49. Route 49 was an improved concrete highway, 40 feet in width, with four traffic lanes. After stopping the truck Marcus switched off the tail-lights, to conserve the battery and facilitate the starting of the engine. He had connected an emergency gasoline tank, and was about to crank the engine when the rear of the trailer was struck by a car driven in a northerly direction by plaintiff, in which his intestate, a nephew, was riding in the front seat. There was a terrific impact, and according to the evidence the truck and trailer, heavily loaded and with the brakes set, were pushed forward some twenty feet. The Nash car in which plaintiff was driving skidded sideways in a northwesterly direction entirely across the highway and came to a stop, even with or slightly north of the front end of the truck, but on the opposite side of the roadway. The car was practically demolished, and plaintiff's intestate was instantly killed. The evidence discloses that plaintiff was driving at a rate of speed admitted to be 40 to 45 miles an hour. The United States weather report introduced in evidence shows that

turned Cuba-ho. Shun Li of Shoch in the Hon-mun, picked up a young man, named Lowdin Hsuan. Hsuan Lowdin, young scholar-mand at the mete of Shone Dwellers in Hon-gwai, \ and-ki-ched, he turned Monse, Ehhhhh, stopped only on the mountain. There he turned on the road Lidion of the Shoshen, the bowmen it was still twilight he did not hear on the moonlights, he continued on his journey, the road proceeding round on road, the then the engine began to question, and so a shortage of gasoline. He throughon pulled the truck over to the edge of the outer Hsuan, stopped and set the brakes. The brakes of the lumber was rusty and muddy and would not engage. The truck, and he was therefore necessary to park on the right hand side of the concrete pavement. The truck was then about two million pounds of lumber, and approximately 1,800 feet beyond Monse Ch, Mion Joint road 17, under to was an improved concrete highway, so that in dark, with a hum twelfth James. After checking the truck Hsuan discovered out the tail-lights, he conserve the battery and headlight. The shortage of the engine. He had constructed an temporary electric lamp, and was about to crank the engine when the sound of the trucker was struck by a car driven in a northerly direction by Shunchi, in which his interests, a region, was driving in the road. There was a terrific impact, and according to the civil law the truck and trailer, heavily loaded and with the lumber, were pushed forward some twenty feet. The truck car in which Lowdin was driving collided sideways in a northwesterly direction and moves the lumber and car to a stop, with left on lightly north of the front and o the road. But on the opposite side of the roadway. The car was practically demolished, and Lowdin therefore was instantly killed. The evidence indicates that Lowdin was driving at a rate of speed conducted to be 40 to 50 miles an hour. The Dated States Weather report increased in evidence shows that

the sun set on that day at 4:21 in the afternoon. It was plaintiff's theory that the accident happened close to 5:30 p. m., while defendants contend that it occurred between 5:00 and 5:15. The time is material, because, under sec. 16, par. 17, chap. 95 of the Motor Vehicle act, as amended in 1923 (Illinois State Bar Stats., 1935) motor vehicles, trailers or semi-trailers, are required to exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction "one hour after sunset to sunrise."

The issue of fact as to defendants' negligence and the care and caution exercised by plaintiff and his intestate, or the lack thereof, was presented to the court and jury through numerous witnesses who testified as to the approximate time when the accident occurred. Upon the second trial all of the witnesses, except Paul Trotter, again testified for plaintiff, and with a few slight variations on immaterial matters, their testimony was the same at each trial. Likewise, all the witnesses who testified for defendants at the first trial, except Gilbert Knaeder, again testified upon the second hearing. In addition thereto, defendants produced the following witnesses to fortify the theory that the accident occurred less than one hour after sunset.

Harry W. Bruns, chief of police of Richton Park for six years, testified that at five or ten minutes after 5:00, while in the vicinity of his home, he was notified by a passing motorist that an accident had happened down the road, that he immediately went to the scene of the accident, and in driving down from Richton Park, it was still light. He drove to the scene of the accident, which was three or four miles south of Richton Park, without lights until he had almost reached the place of the occurrence. Upon his arrival he sent his car back to Richton Park for the purpose of

calling an ambulance, and he stated that the ambulance arrived about 5:20 or 5:30. While waiting for the ambulance he looked at his watch, and it was then 5:15 and just getting dark. As heretofore stated, Bruns did not testify upon the first trial.

Mrs. George Hall likewise testified for the first time at the second trial. She is the wife of George Hall, a witness at both trials. She stated that together with her husband and two children they had attended a girl scout meeting at Chicago Heights, which adjourned about 20 minutes to 5:00, and after leaving the meeting they proceeded south on route 49, arriving at the scene of the accident between 5:00 and 5:15; that it was just beginning to get dark, and they stayed there for five or ten minutes and then drove on to Monee, where they lived, arriving there about 5:30; that upon arriving at the scene of the accident, there was no occasion for lights, and that her husband turned on the headlights of his automobile only when he saw the other cars at the accident with their lights burning.

Chris Hall, who did not testify at the first trial, operated a garage at Monee with his brother, George. He testified that the accident on route 49, which occurred about "1,500 feet north of the 'Y'," was about two and a half miles from his place of business; that he received word of the accident from his brother, between 5:20 and 5:30, and immediately drove the wrecking car out to the accident and brought plaintiff's automobile back to his garage. He remembered the time of the occurrence by reason of the fact that his brother was to relieve him at 5:30, so that he might go to supper, and testified that as he drove out to the accident it was just getting dusk, "between dark and dusk."

The fourth additional witness was Mrs. Dora Plumhoff, who had lived in Monee 29 years. She testified that she was at home when

a man came to their house, between 5:00 and ten minutes after 5:00, to inform her husband, a police officer, of an accident on route 49 northeast of Monee. Her home was situated on the highway. She, her son, her sister and her husband had just sat down to eat their supper when they received this information. The time was fixed in her mind because her sister spent weekends with her in Monee, and was accustomed to take the bus back to Chicago at 5:35, and for that reason they always had their Sunday meal at 5:00 o'clock. She stated that as she looked outdoors at the time the information was brought to them, it was not dark but just beginning to get dark.

In reversing the judgment and remanding the cause for a new trial on the former appeal of this cause, we said:

"Defendants contend that the overwhelming evidence shows that the accident occurred in less than one hour after sunset and consequently there was no statutory requirement for taillights and there was no negligence on the part of defendant, Marcus, in momentarily stopping the truck for the purpose of changing to the reserve tank for his supply of gasoline. As to this contention we may say that, in our judgment, the verdict finding defendants guilty of negligence is against the manifest weight of the evidence."

The evidence adduced by plaintiff on the second hearing was substantially the same as on the former trial, except that Paul Trotter did not testify. On the other hand, all the witnesses who testified for defendant at the first trial, except Gilbert Knaeder, again testified upon the second hearing, and in addition thereto the evidence of the witnesses, whose testimony has heretofore been set forth, strengthened and corroborated defendants' version of the time when the accident occurred. Under the circumstances, we are obliged to again hold that the verdict finding the defendants guilty of negligence is against the manifest weight of the evidence.

In addition to the question of defendants' negligence, the jury were also called upon to determine whether the plaintiff and his intestate were in the exercise of due care and caution. In this

a man came to their house, between 5:00 and ten minutes after 5:00, to inform her husband, a police officer, of an accident on route 49 northbound of Monroe. Her home was situated on the highway. She, her son, her sister and her husband had just sat down to eat their supper when they received this information. The time was fixed in her mind because her sister spent Wednesday with her in Monroe, and was accustomed to take the bus back to Chicago at 5:30, and for that reason they always had their Sunday meal at 5:00 o'clock. She stated that no one looked outdoors at the time the information was brought to them, it was not dark but just beginning to get dark.

In reversing the judgment and remanding the cause for a new trial on the former appeal of this cause, we said:

"Defendants contend that the overwhelming evidence shows that the accident occurred in less than one car after sunset and consequently there was no statutory requirement for twilight and there was no negligence on the part of defendant. Moreover, in momentarily stopping the truck for the purpose of changing to the reserve tank for lack supply of gasoline, as to this contention we may say that, in our judgment, the verdict finding defendants guilty of negligence in spite of the manifest weight of the evidence."

The evidence adduced by plaintiff on the second hearing was substantially the same as on the former trial, except that Earl Trotter did not testify. On the other hand, all the witnesses who testified for defendant at the first trial, except Gilbert Meeder, again testified upon the second hearing, and in addition thereto the evidence of the witnesses, whose testimony has heretofore been set forth, strengthened and corroborated defendants' version of the time when the accident occurred. Under the circumstances, we are obliged to again hold that the verdict finding the defendants guilty of negligence is against the manifest weight of the evidence.

In addition to the question of defendants' negligence, the jury were also called upon to determine whether the plaintiff and his intestate were in the exercise of due care and caution. In this

connection it appears, from the evidence, that plaintiff was driving the Nash car at a considerable rate of speed, with only his dim lights turned on. These afforded him a vision of not to exceed 50 feet. Luhrsen testified that he could have stopped the car within thirty feet. Defendants counsel argue, as they did on the first appeal, that it was reckless and negligent for plaintiff and his intestate to proceed at 40 to 45 miles an hour, with only the dimmers of their automobile shining, and that they could have avoided the collision by the exercise of ordinary care. Luhrsen's testimony is the only evidence that bears upon the question as to whether or not the deceased was in the exercise of care and caution at the time of and just prior to the collision, and defendants contended upon the first appeal, and now contend, that the trial court should have directed a verdict for defendants upon the ground that the intestate was guilty of contributory negligence. In our first opinion we said that while this contention is not without force, it would hardly justify us in so holding as a matter of law, but that the verdict of the jury, so far as it indicates that plaintiff's intestate was in the exercise of ordinary care for his own safety, was against the manifest weight of the evidence. The testimony on this phase of the case was the same on both trials, and therefore we are again obliged to hold as we did in our former opinion.

As additional ground for reversal it is urged that the trial court erroneously refused to grant defendants' motion to withdraw a juror, discharge the panel and continue the cause, because of improper questions propounded to Marcus which resulted in testimony apprising the jury that he had made a report of the accident to the insurance company, and it is also argued that the court erroneously instructed the jury. In view of our conclusions upon the principal points of the case, and the consequent necessity for a retrial, we do not deem

[illegible] in question, from the [illegible], at a [illegible] driving the [illegible] car at a [illegible] while it passed, with [illegible] the lights turned on. There [illegible] him a vehicle at not [illegible] exceed 30 feet. Lumsden testified that he could have stopped the car within thirty feet. [illegible] counsel argue, as they did on the first appeal, that the [illegible] were negligent in [illegible] and his intestate to proceed to cross so as [illegible] an hour, with only the glimmer of their [illegible] thinking, and that they could have avoided the collision by the exercise of ordinary care. Lumsden's testimony is the only evidence that bears upon the question as to whether or not the [illegible] and in the [illegible] of [illegible] collision at the time of and just prior to the collision, and [illegible] depended upon the [illegible], and not [illegible], that the [illegible] should have [illegible] for [illegible] the [illegible] the intestate was guilty of contributory negligence. We are [illegible] opinion we said that while this evidence is not [illegible], it would hardly justify us in [illegible] as a [illegible] of fact, but that the verdict of the jury, as far as it [illegible] that [illegible] Lillie's intestate was in the exercise of ordinary care for his own safety, we against the manifest weight of the evidence. The [illegible] many on this phase of the case, the same as [illegible], and therefore we are again obliged to hold as we did in our former opinion.

As additional ground for reversal it is urged that the trial court erroneously refused to grant defendant's motion to dismiss a juror, discharge the panel and continue the cause, because of improper questions propounded to jurors which resulted in prejudice, specifically the jury that he had been a friend of the [illegible] to the transaction [illegible], and it is also claimed that the court erroneously [illegible] the jury. In view of our conclusion upon the preceding points of the case, and the [illegible] unnecessary for a restatement, we [illegible] down

a discussion of these points to be necessary, as the errors will undoubtedly be obviated upon retrial.

For the reasons stated the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

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38961

FAYE WILLIAMS, guardian of the estate of CHARLES WILLIAMS, Jr., a minor, Appellee,

v.

BOWMAN DAIRY COMPANY, a corporation, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

289 I.A. 204

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Faye Williams, suing as guardian of the estate of Charles Williams, Jr., a minor, had judgment in the Superior court for $9,500 rendered pursuant to the verdict of a jury, for injuries to the ward caused by a milk wagon owned and operated by defendant.

It appears from the evidence that August 3, 1933, Charles Williams, Jr., sometimes called "Chickie", then about five and one-half years of age, was playing with some other boys in the alley to the rear of his home at 1043 Lill avenue, Chicago. One of defendant's horse-drawn wagons was parked in the alley, facing east alongside a telegraph pole, its driver, William Lyszinski, who had been in defendant's employ only about two and one-half weeks, having left the wagon to deliver milk to various customers in the neighborhood. Through circumstances, as to which the evidence is conflicting, the horse pulled the wagon forward and ran over the child, causing serious injuries. The issue of fact presented is whether or not defendant's horse was fastened or tied in accordance with sec. 2007, p. 783, of the Revised Chicago Code, 1931, which reads as follows:

"No vehicles shall be left unattended while the motor of said vehicle is running. It shall be unlawful to leave any horse or mule unattended in any street without having securely fastened said animal."

On this question and as to the negligence of defendant and the minor, plaintiff produced four witnesses and defendant two.

Thomas Foy, a witness for plaintiff, testified that he was walking down Seminary avenue, looked down the alley and saw Chickie and another boy near the wagon; that as the horse started to run Chickie tried to get away but fell under the wagon; that there was a telephone pole at the side of the wagon; that as he walked toward the wagon he observed a bridle on the horse's head, and saw the reins inside the wagon; that the doors of the wagon were open, and that no weight was attached to the horse.

Ruth Jennings, another of plaintiff's witnesses, testified that she observed the wagon in the alley near a telegraph pole; that Chickie was alongside the wagon, and, as the horse started forward, it ran over Chickie; that there was no weight attached to the horse, and nothing hitched to the horse's mouth; that when she first saw Chickie he was not doing anything in particular, and that she did not see him on the horse or wagon.

Thomas Slattery, also a witness for plaintiff, testified that he came down the alley about five minutes before the accident; that he passed about four or five feet from the horse's head, observed the horse and wagon standing there, and that the doors of the wagon were open; that the horse was not tied or fastened, and that no weight was attached to the horse's head.

Chickie's mother, Faye Williams, testified that shortly before the accident she went to the garbage can in the alley, three or four feet from where the horse and wagon were parked; that there was nobody in the wagon, no weight on the horse, and that the horse was not tied to anything.

William Tyksinkki, driver of the wagon, testified on behalf of defendant that on stopping his wagon in the alley, he snubbed up his

reins on a hook within the wagon, attached a chain, which was anchored to the floor of the wagon, around the spokes of the rear right wheel, and proceeded to make his deliveries; that when he returned the wagon was gone and he found it about two blocks from where the accident occurred, and that the chain, although still attached to the floor of the wagon, was dangling loose along the ground. When testifying, he was still in the employ of defendant.

The defense proceeded on the theory that a chain, attached to the floor of the wagon, was fastened to one of the rear wheels by means of a hook, and was designed to prevent the wheel from turning, thus acting as a drag on the horse so that the vehicle could not easily be drawn along, and defendant sought to prove that Chickie had released the hook from the wheel, then climbed on the wagon, pulled the reins and caused the horse to start. In order to substantiate Tyksinski's testimony that he had attached a chain to the wheel, and to lend support to the theory that Chickie had, before stepping into the wagon and taking the reins, unfastened the chain, Charles Jerome, a boy seven years of age, was produced as a witness by defendant, and testified on direct examination that Chickie did something with the wagon before stepping into it and taking hold of the reins, and that as the horse started he (Chickie) fell to the ground and was injured when one of the wheels ran over his head. On cross-examination he told a different story, stating that he never saw a chain on the wagon, and that the idea of a chain was first suggested to him by L. Edward Hart, Jr., counsel for defendant, before the trial. On redirect examination Jerome repeated the substance of his statement on cross-examination, as follows:

"Q. (By Mr. Hart, Jr.) Now, Charles, what did you see Chickie do at the back wheel?

A. He got run over. That is all I saw.

Q. Did you see him do anything with anything on the back wheel?

A. Yes, a big iron there. A big iron thing on the wheel. A chain on the back wheel.

Q. Now, did you see that, or did I tell you there was one there?

A. You told me."

The boy's testimony on redirect examination is uncontroverted, and his testimony, together with Tyksinski's, constitutes all the evidence adduced by defendant on the question of negligence.

It is urged that plaintiff's evidence is of a negative character, and therefore not entitled to the probative value to be given the positive testimony of defendant's witnesses. Railroad accident cases are cited, holding that the negative testimony of witnesses tending to prove that they did not hear a bell or see a light, does not constitute evidence that the light was not there or the bell was not sounded, but we think the class of cases cited by plaintiff are more applicable to the circumstances of this case for the following reasons: The defense is based on evidence intended to support the theory that although the horse was not tied, a chain fastened to the floor of the wagon and hooked to the hind wheel, gave the same security as if the horse had been tied, and was therefore a compliance with the ordinance. It thus became an issue of fact for the jury to determine whether or not such a chain was actually fastened to the rear wheel, and the testimony of plaintiff's witnesses that they were in close proximity to the horse immediately prior to the accident, and that there was no such chain, was not only competent but material to the issues of fact presented, both as to the violation of the code by the driver and as to defendant's common law negligence. It was held in West Chicago Street R. R. Co. v. Mueller, 165 Ill. 499, that where there are two classes of witnesses of equal intelligence, who have the same opportunity of knowing the

fact, and their attention has been directed to it, "then, although one testifies that the occurrence did take place, and the other that it did not, the latter testimony is not to be treated as negative," citing Rockford, Rock Island & St. L. R. R. v. Hillmer, 72 Ill. 235. Similarly in Chicago & Alton R. R. v. Pelligreen, 65 Ill. App. 334, the court said (p. 335):

> "Where one man swears that A struck B and another swears that A did not strike B, and both had equal opportunity to see and know the facts, the testimony of each of the witnesses is affirmative in the legal signification of the term. So the testimony of the brakeman in this case that he did not, on this occasion, push appellee, or any other woman, violently up the steps in helping her on the train, is not to be regarded as having less weight than appellee's testimony on that point simply because it is couched in negative terms."

(Citing C. B. & Q. R. R. Co. v. Cauffman, 38 Ill. 424; C. B. & Q. R. R. Co. v. Lee, 87 Ill. 454; and R. R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 235.)

Chicago Cons. Traction Co. v. Gervens, 113 Ill. App. 275, is to the same effect. Wigmore on Evidence, 2nd ed., vol. 1, pp. 1668, 1671, states there is no inherent weakness in negative knowledge, and that it may even sometimes be stronger than affirmative impressions.

In any event, it cannot seriously be contended that plaintiff's evidence was not competent, and according it the probative value to which the authorities say it is entitled it was a question for the jury to determine whether defendant's driver was negligent in allowing his horse to be parked in the alley without being securely fastened, both as a matter of law and in violation of the city ordinance. Defendant asserts that the verdict of the jury and the judgment of the court is contrary to the manifest weight of the evidence, but from a careful examination of the record we are convinced that, so far as the facts are concerned, the jury was fully justified in returning a verdict in favor of plaintiff.

Plaintiff argues that even if the driver had fastened the

reins and chain as he testified, the same does not constitute a compliance with the ordinance, because the ordinance requires that the animal be securely fastened, and not the wagon, and there is no contention that the horse was fastened or tied. There is evidence to support the conclusion that the horse and wagon were parked near a telephone pole, and it would have been a simple thing for the driver to have securely fastened the horse to the pole, as the ordinance requires. This was obviously not done.

Plaintiff argues that even if defendant's driver had fastened the chain to the rear wheel of the wagon it would not have prevented the horse from running away; that it would at most have placed a greater burden on the horse, and, perhaps, prevented it from running as fast as it might if otherwise unhampered, but that it could still have pulled the wagon along sufficiently to cause injury, and that tying the reins of the horse to the wagon furnishes no security. We think there is considerable force to this contention, and that the jury may well have considered these circumstances in arriving at their verdict.

It is urged that the action was instituted by a person without proper authority, because at the time suit was filed the mother was not a duly appointed guardian. However, letters of guardianship were later issued by the Probate court. Defendant's counsel concede that an extensive search of authorities in this and other states discloses no case directly bearing upon the question whether or not, after the institution of a law suit, an order making the plaintiff a competent person to sue in the action sought to be maintained, validates prior acts. The statute recognizes the right of a mother to institute suit as next friend of the minor without any previous appointment by the court (chap. 64, sec. 18, Illinois State Bar Stats., 1935) and it has been held that a next friend is one who,

without being regularly appointed guardian, acts for the benefit of an infant. (Zazove v. N. St. P. & S. S. M. R. R., 219 Ill. App. 534.) Therefore, if the mother had designated herself as next friend instead of guardian, no question could arise, and since, ultimately, the suit was instituted for the benefit of the minor, even though the mother was designated as guardian, instead of next friend, does not indicate that she was an improper party or that the suit was improperly brought.

Complaint is made that plaintiff's instruction No. 1 permitted the jury to include in its award of damages the loss of earnings of the injured boy during his minority. This specific objection was raised for the first time on the argument of the motion for a new trial. Plaintiff then made the father an additional party, and the complaint was amended so as to relinquish any rights that the father had to the earnings of the minor during his minority. A similar question was raised in Chicago Screw Co. v. Weiss, 293 Ill. 536, and in discussing the question, the court said (p. 541):

"Instruction No. 3 given for the appellee was intended to enlighten the jury as to the elements of damage proper to be considered in case they found for the appellee. The loss of earnings while incapacitated from work was included as an element of damages. The appellee was a minor and his father was alive, and it is urged that the right to recover compensation for his services and labor was in his father, and hence it is urged that the instruction was erroneous. The appellant company, without objection, permitted proof to be introduced as to the ability of the appellee to earn wages, and did not seek to raise the question of the right of the appellee to receive his earnings until after the verdict of the jury had been returned. The question was first raised in the motion for a new trial. The suit was instituted and had been prosecuted to verdict in the name of the appellee by Rose Weiss, his sister, as his next friend. A motion was entered by said Rose Weiss for leave to withdraw as next friend of the appellee, and another motion was presented by Frank Weiss, his father, to be appointed as his next friend. These motions were granted, and Rose Weiss withdrew her appearance as next friend and the father of the appellee was substituted in her stead, and he appeared in open court and accepted the appointment. * * *

"The parent may relinquish his right to the earnings of his child, and that he has done so may be inferred from the conduct of the parent, (21 Am. & Eng. Ency. of Law, 2d ed., 1059) and the prosecution of a suit in the name of the child by the father as next friend, for the recovery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the

[illegible] being regard the property [illegible] of an interest. [illegible] v. [illegible], [illegible] 4th. App. 544.) Therefore, if the [illegible] friend's failing of promotion, [illegible] ultimately, the [illegible] even though the mother [illegible] next friend, does not [illegible] claim the only [illegible].

Applying it to the [illegible] matters the jury or tribunal in [illegible] of consideration of the [illegible] of the injures by [illegible]. This specific objection was raised for the first time on [illegible] a new trial. [illegible] and the complaint was [illegible] the father has to [illegible] on the minor [illegible]. [illegible] similar question was [illegible] in [illegible] v. [illegible], [illegible] 756, and in discussing [illegible] the court [illegible]:

"Instructions 6, 7, 8 and 9 are the appellee's [illegible] enlighten the jury as to the [illegible] of damage proper to be considered in case they "come to the verdict". The loss of a minor child [illegible] from work [illegible] in an [illegible] of damages. The appellee [illegible] "[illegible]" [illegible] that the right to recover [illegible] was in his father, and before [illegible] proof to be introduced [illegible] of the [illegible] wages, nor did not seek to make [illegible] of the [illegible] of the appellee to receive his [illegible] jury has been returned. The question [illegible] in the motion for a new trial. [illegible] pronounced to be [illegible] appellee by [illegible] his right, [illegible] and another motion [illegible] by [illegible] and have [illegible] father of the appellee [illegible] in open court and [illegible] the appellant. *

"The parent may relinquish his right to the services of his child, and if he has done so, he may be [illegible] from the conduct of the parent. (Lin. [illegible] v. [illegible], 1 [illegible] 64.) [illegible] of a suit in the name of the child by the father or next friend, for the recovery of the services or the wages, [illegible] to be established to a reasonableness on the part of the father of the

authority to collect or claim such earnings in his own right. It was so expressly ruled in Baker v. Flint & Pierre Marquette R. R. Co., 91 Mich. 298."

See, also, American Car & Foundry Co. v. Hill, 226 Ill. 227; White v. Seitz, 258 Ill. App. 318.

It is urged that the conduct of plaintiff's counsel was so prejudicial as to constitute reversible error. No specific instances of misconduct are cited, the charges being general in character. We have read the arguments of counsel and find nothing therein which would justify reversal of the verdict and judgment on that account.

Lastly, it is argued that certain hypothetical questions propounded by plaintiff's counsel did not include all the undisputed evidence. While there may have been some minor details omitted, this would not be erroneous, and if defendant was of the opinion that the omitted evidence was material, it should, on cross-examination, have propounded a hypothetical question including the omitted evidence. Not having done so, it is not in a position to complain for the first time on appeal. (Chicago City Rys. Co. v. Bundy, 210 Ill. 39; Mahannah v. Bergfeld, 274 Ill. App. 97.) Moreover, an objection to a hypothetical question is limited to the ground specified (Todd v. Chicago City Ry. Co., 197 Ill. App. 544); and where the objection is not specific, and does not point out the elements alleged to have been omitted from the question, it is not the duty of the trial court to go through the record to ascertain whether all the elements were included. (Riverton Coal Co. v. Shepherd, 207 Ill. 395, 397.)

We find no convincing reason for reversal. The judgment of the Superior court should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

not

39011

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JULIA M. ADAMS,
Appellant,

v.

ISADORE STEIN et al.,
Defendants.

CHICAGO TITLE & TRUST COMPANY,
a corporation,
Appellee.

CHICAGO TITLE & TRUST COMPANY,
a corporation, (cross-complainant),
Appellee,

v.

ISADORE STEIN et al.,
(cross-defendants).

JULIA M. ADAMS,
(cross-defendant),
Appellant.

289 I.A. 621

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

April 17, 1928, Isadore S. Stein and Fannie L. Stein, his wife, executed their seven principal promissory notes of that date, payable to bearer, in the following amounts and maturities:

"Note No.	Amount of Note	Maturity
A	$ 500	April 17, 1930
B	500	April 17, 1931
C	1,000	April 17, 1932
D	1,000	April 17, 1933
E	1,000	April 17, 1933
F	1,000	April 17, 1933
G	12,000	April 17, 1933."

All the notes bore interest at the rate of 6% per annum, evidenced by interest coupons attached to the principal notes. The indebted-

ness was secured by trust deed of even date with said notes, conveying to Chicago Title & Trust Company, as trustee, certain improved real estate in Chicago. All the notes were owned and held by the Reliance State Bank (hereinafter referred to as the Bank) until June 26, 1928, when notes D, E, F and G, aggregating $15,000, were sold to Chicago Title & Trust Company, cross-complainant herein, under an agreement by which the Bank undertook to subordinate the lien of the trust deed, in so far as it secured the payment of notes A, B and C, to the lien of the trust deed so far as it secured the payment of notes D, E, F and G. Thereafter all the notes were delivered to Earle A. Layton, of the Chicago Title & Trust Company, who testified that he caused to be placed on the blue cover, which was attached and riveted to each of notes A, B and C, a legend in words and figures as follows:

"For valuable consideration the lien of this note and all other notes stamped with this legend, being an aggregate of $2,000, both as to principal and interest, is hereby subordinated and made junior to the lien of notes numbers D, E, F and G, issued and outstanding under the within mentioned trust deed, and not stamped with this legend. The serial numbers of the specific notes which have been so subordinated are enumerated in a certain subordination agreement between The Reliance State Bank and the Chicago Title & Trust Company."

Three months after sale of the indebtedness evidenced by notes D, E, F and G, the Bank sold note "C", for $1,000 to Mrs. Julia E. Adams, the complainant. Upon default in payment of her note Mrs. Adams accelerated the entire indebtedness, and April 12, 1933, filed a bill of foreclosure on behalf of herself and the owners of the other notes. The Chicago Title & Trust Company subsequently filed its cross bill of complaint, and the cause was referred generally to a master in chancery, who found the equities in favor of complainant, recommended foreclosure under the bill, and the dismissal of the cross-complaint. Upon hearing of exceptions to the master's report, the chancellor sustained those filed by cross-complainant, ordered the dismissal of the bill and entered a decree in favor of

cross-complainant. This appeal followed.

The question of fact involved is whether or not note "C", when purchased by Julia M. Adams, contained the blue cover with the legend of subordination stamped thereon, and whether she had notice of the subordination agreement entered into between Chicago Title & Trust Company and the Bank. Regardless of any conflict as to the condition of the note when it was purchased by Mrs. Adams, the testimony is uncontradicted that at the time of the sale to Chicago Title & Trust Company of notes D, E, F and G, there was a definite subordination agreement between the Bank, as owner of the indebtedness secured by the trust deed, and the Chicago Title & Trust Company. At the time Mrs. Adams purchased note "C", a sales ticket was drafted by the Bank prominently bearing the notation "Subordinated Bond," and also the following:

"Principal	$1,000.00
allowed interest	3.00
Total	$ 997.00
To yield	26.60
Total due	$ 970.40."

This receipt was signed by Mrs. Adams and she testified that she read the receipt but did not remember having seen the notation "Subordinated Bond" thereon.

The sale was negotiated through Anthony Cremerius, an employee of the Bank at the time of the sale. He testified that when Mrs. Adams bought note "C" it had a blue back cover with the subordination legend stamped thereon. There is evidence also showing that Cremerius is an attorney and represented Mrs. Adams for a number of years; that she called on him in his office in April, 1932, when he was no longer connected with the Bank, bringing note "C" with her, and asked him to collect it for her. She paid him $15 at that time to defray the costs of filing suit. Cremerius testified that when Mrs. Adams brought the note to him on that occasion the blue cover was still attached to the note, but that no conver-

sation was had with reference to the fact of its subordination. Walter L. Mueller, another employee of the Bank, also testified that when the note was sold to Mrs. Adams it contained a blue back cover with the subordination legend stamped on the inside thereof. After the master had rendered his report, cross-complainant filed a petition alleging that it had newly discovered evidence bearing upon the issue of fact which was not theretofore available, and the chancellor rereferred the cause to the master, who heard the newly discovered evidence. It consisted of the testimony of Mr. and Mrs. Stein, the mortgagors. Isadore Stein testified that he saw the note in Cremerius's office some time in 1932, and that it then had a blue cover on the inside of which was a rubber stamp, about four inches wide and two and one-half inches high. Both he and his wife stated that they had a conference with Mrs. Adams in 1931, in which she told them that she was sorry that she had bought the note; that she had bought it against her better judgment, and that Mr. Cremerius had prevailed upon her to make the purchase even though it was a subordinated note; that in three subsequent telephone conversations with Mr. Stein complainant repeated this statement, and each time used the term "subordinated note". Mrs. Stein testified that complainant called upon her in March, 1931, and that the conversation which ensued was substantially as follows: "Mrs. Stein: Now you come to take the roof from over me? Mrs. Adams: No, I did not come for that - I cannot do that. The Chicago Title & Trust Co. have a first mortgage. They can do that. I have a subordinated note." Mr. Stein further testified that when he received notice of the foreclosure he asked Mrs. Adams what remedy she expected to obtain with a subordinated note; that Mrs. Adams did not deny the note was subordinated, but said the fact that it was subordinated could not be proved.

Mrs. Adams, testifying in her own behalf, denied that the note had a blue back cover when she purchased it. She also denied the conversations with Mr. and Mrs. Stein. When the note in question was purchased Mrs. Adams turned in for credit some securities which had not yet matured, bearing interest at 6 1/2%. She states that she never purchased subordinated notes and that she did not know this note was subordinated when she acquired it. It is evident from the record, however, that she was familiar with the purchase and sale of securities, having on numerous previous occasions had transactions with the Bank. And it appears fairly certain that, when notes D, E, F and G were purchased by Chicago Title & Trust Company, blue covers were placed on the subordinated notes A, B and C and the subordination stamp placed on the inside cover of each at the office of Chicago Title & Trust Company. Layton testified that he instructed his stenographer to place these covers on the notes and stamp them, and when the notes came back to him that they each had a blue cover with the stamp on the inside thereof. When note "C" was introduced in evidence by complainant, it had no cover and showed unmistakable signs of having been mutilated. An examination of the original note shows that two pieces were torn from the note in the exact places where rivets had evidently fastened the note either to interest coupons or to the blue cover, or both. Notes D, E, F and G, the unsubordinated notes, which were also introduced in evidence, are each riveted with two fasteners, and contain blue covers. By comparison of the location of the rivets on these notes with the mutilations on note "C", it is evident that note "C" was torn loose from the fasteners by some one, and neither Mrs. Adams nor any one on her behalf make a satisfactory explanation of this mutilation.

Commenting on witnesses who testified as to the condition

of the note when purchased by Mrs. Adams, the master found that the testimony of Mueller and Cremerius "is based not on positive recollections but on the routine of the business. The evidence shows that there was a contest being held in the Bank; that there were two teams selling bonds, notes and securities, with individual prizes for the largest sales. With so many transactions taking place, it is hardly conceivable that salesmen could remember any one transaction." With reference to the testimony of Mr. and Mrs. Stein, the master considered it merely cumulative. Plaintiff's counsel seeks to discredit the testimony of these witnesses by showing that they had an interest in the litigation. Cremerius had severed his connection with the Bank and was no longer interested. Mueller was employed by the receiver of the Bank. The Steins were liable as mortgagors on all the notes, whether subordinated or not, and they, as well as Cremerius and Mueller, certainly had no greater interest than Mrs. Adams, who was seeking a decree of foreclosure.

Taking into consideration the testimony of the several witnesses that note "C", as well as the other notes, had blue back covers attached thereto, that notes A, B and C had the subordination legend stamped on the inside of the covers, the physical appearance of the note itself when it was introduced in evidence, showing unmistakable signs of mutilation with no satisfactory explanation thereof, the receipt signed by Mrs. Adams when she purchased the note which she admitted signing and reading, showing on its face that it was a subordinated security, and the fact that she admittedly knew she was buying a 6% interest bearing note at a discount so as to make it yield 7%, it is difficult to believe that Mrs. Adams was unaware of the fact that she was purchasing a subordinated note. The circumstances rather lead to the conclusion that she purchased the note, knowing it to be subordinated, because it offered a higher rate of interest

of the note that [illegible] the testimony of [illegible] recollections [illegible] shows that [illegible] there were [illegible] individual [illegible] being placed, it [illegible] any one [illegible] Mrs. [illegible] counsel seeks to discredit [illegible] showing that they [illegible] severed his connection [illegible] Mueller was employed [illegible] liable as mortgagors [illegible] and they, as well [illegible] interest than Mrs. [illegible]

Taking into consideration [illegible] witnesses that note "C", [illegible] covers attached thereto, [illegible] legend stamped on the inside of [illegible] physical [illegible] of the note itself [illegible] takable signs of mutilation [illegible] the receipt signed by Mrs. [illegible] she admitted signing and [illegible] subordinated security, and [illegible] buying a 6% interest bearing [illegible] yield 7%, it is difficult to believe [illegible] the fact that she was [illegible] rather lead to the conclusion [illegible] it to be subordinated, because it [illegible]

as an investment. It was conceded on oral argument that the principal issue between the parties was one of fact, and that if Mrs. Adams had knowledge of the subordination agreement she was bound thereby. As hereinbefore stated, we think there is abundant evidence to establish the fact that she had such knowledge, and therefore she was not entitled to a foreclosure as recommended by the master.

In recommending a decree in favor of Mrs. Adams the master said that "even if the blue cover was attached to the note at the time Mrs. Adams made her purchase, the character of the attempted subordination was not sufficient to charge the purchaser with notice thereof." He based this conclusion on the provisions of subparagraph (c) of par. 265, chap. 32 (Cahill's 1933 Illinois Rev. Stats.) which provides that the mortgage and notes securing a junior indebtedness shall bear across the face and affixed to each note a legend in red letters indicating that the incumbrance is a junior mortgage. If, as a matter of fact, the blue cover was actually attached to note "C" when Mrs. Adams purchased it, and she knew that it was a subordinated note, subparagraph (c) of the section of the statute cited by the master, would not exempt Mrs. Adams from the consequences of taking a subordinated note with notice, even though the subordination legend was not stamped on the note itself. The master also cites an amendment of the statute, made subsequent to the transaction at bar (subparagraph (d), par. 265, chap. 32 (Cahill's 1933 Illinois Rev. Stats) which requires subordinated notes to be so stamped. That amendment could not operate retroactively, and therefore has no application to the facts of this case.

Various propositions of law are urged and argued by counsel on both sides, but in view of our conclusions as to the facts we

believe a discussion of these points unnecessary. After a careful examination of the testimony, the exhibits, and the circumstances attending this transaction, we have reached the conclusion that the chancellor properly sustained cross-complainant's exceptions to the master's report and that the decree in favor of cross-complainant was properly entered. The decree of the Superior court is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

39022

RALPH CARLBURG,
Appellee,

v.

HENDERSON PLASTERING COMPANY,
a corporation,
Defendant.

MacDOWELL-SCHEYING CONSTRUCTION
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

289 I.A. 57

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

MacDowell-Scheying Construction Company appeals from a judgment rendered against it as garnishee in the sum of $229.

Ralph Carlburg secured a judgment for $904 against Henderson Plastering Company November 5, 1935. Execution issued thereon and was returned nulla bona. Thereafter the statutory affidavit for garnishment was filed and summons issued and served on garnishee November 7, 1935, returnable November 12, 1935. Carlburg sought to garnishee funds in the hands of MacDowell-Scheying, garnishee, which were claimed to be due the Henderson Plastering Company, employed as a subcontractor to do work on property at 1050 North Western avenue, Chicago, owned by the Commonwealth Edison Company. Garnishee filed its answer in due course, which was subsequently amended, stating that the last work done on the contract between Henderson Plastering Company, and the garnishee upon the premises involved was performed about September 18, 1935; that Lyle Henderson, Kenneth Bayer and George Ryan were the laborers who performed the services for the Henderson Company

in connection with its contract at the said premises; and that on and prior to November 15, 1935, there was due to the three laborers the aggregate sum of $229, and that on the last aforementioned date, which was less than sixty days after the last work was done in the performance of the contract between Henderson Company and garnishee, the laborers then each had a right to file a claim for a mechanic's lien upon and against the premises for the respective amounts due and owing to them; that prior to November 15, 1935, the laborers informed garnishee that they had not been paid for their labor, and that unless they were paid before the expiration of the time allowed by law for the filing of their respective claims for mechanics' liens that such claims would be filed; that thereupon the garnishee requested and demanded of Henderson Company that it should immediately pay the laborers the respective amounts due and owing to them, in order to avoid the filing of mechanics' liens on their behalf and thereby hindering and delaying the garnishee in its efforts to obtain settlement from the Commonwealth Edison Company, owner of the premises; that in response to such request and demand the Henderson Company, on November 15, advised the garnishee that the respective amounts were due and owing the laborers, and authorized and requested garnishee to pay them. This request was made in the form of a letter, dated November 15, 1935, as follows:

"November 15, 1935.

Mac-Dowell-Scheying Const. Co.,
20 N. Wacker Drive,
Chicago, Illinois.
Gentlemen:

The employees of the Henderson Plastering Company listed below have wages due and unpaid for work done in connection with the lathing and plastering of the Humboldt Park Distributing Station at 1050 North Western Avenue of which H. V. Von Holst is the architect and the Commonwealth Edison Company is the owner.

You are hereby authorized to make payment and secure release from these men.

Lyle Henderson, 4029 Melrose St.,Chicago,Ills.	$109.00
Kenneth Bayer, 1435 S. Grove Ave.,Berwyn,Ill.	60.00
George Ryan, 6622 Lakewood St.,Chicago, Ill.	60.00

Yours very truly,
HENDERSON PLASTERING COMPANY
By John P. Barton,
Sec."

The answer further averred that on receipt of the foregoing authorization the garnishee agreed to pay the laborers the respective amounts due them as soon as settlement was made with the Commonwealth Edison Company, and that said laborers accepted the promise and assurance of payment and therefore refrained from filing their claims for mechanics' liens; that the authorization to pay, and the acceptance by the men to receive the amounts due them as aforesaid, constituted an assignment of the funds due the Henderson Company from garnishee, and therefore garnishee was not indebted to the Henderson Company.

The question presented is whether the garnishee should have been discharged upon its answer, on the theory that it was justified in withholding the sum due the three laborers to whom the Henderson Plastering Company admittedly owed money for wages, notwithstanding the fact that they had not actually filed their claims for mechanics' liens. Plaintiff takes the position that "a right to file a claim for a mechanic's lien is not the same as perfecting the claim by filing it under the statute," and that since the wage claimants did nothing to perfect their lien, the money due the Henderson Company, was properly held to be payable to plaintiff under the garnishment process. To so hold, it would be necessary to overlook entirely the authorization of November 15, 1935, hereinbefore set forth, by which the Henderson Company delivered to the garnishee a writing containing its statement that there was due and unpaid to employees for wages, in connection with the lathing and plastering of the premises

involved, the aggregate sum of $229. The garnishee's answer avers that this statement was delivered to it within sixty days after the work was completed, and was accepted by the garnishee; that pursuant thereto the laborers were induced to forego filing their claims for liens, upon the assurance of the garnishee that their wages would be paid when settlement was made with the Commonwealth Edison Company, owner of the building; and it is urged by garnishee's counsel that this transaction perfected the lien of the laborers, and thereafter it became the duty of the garnishee to retain sufficient money to pay their claims. We think there is considerable force in the argument. It is pointed out that the statement contained in the letter of November 15 was a sufficient compliance with the statute even though it was not sworn to. Section 5 of the Mechanics' Lien act (chap. 82, Illinois State Bar Stats., 1935) provides that before the owner shall pay any amount to the contractor he shall require a statement under oath, and sec. 27 requires the owner to retain sufficient money to pay the claims of those named in the statement. It is argued that the statement thus performs two functions, namely, (1) it is a statement to the contractor that he owes for labor and materials only the amounts specified and is entitled to be paid that part of the amount due on his contract in excess of the claims for labor and materials shown in the statement, and also (2) that it is a notice of the claims of the parties named and constitutes an admission of indebtedness that would be competent evidence, whether under oath or not. Sec. 24, which provides for notice to be given by the claimant, does not require that it be sworn to, and therefore no greater formality should be required in a notice signed by the party acknowledging the indebtedness than by the claimant. Moreover, under sec. 24 it is not necessary that claimant shall sign the notice, but only that he

involved, the amount to be paid is [illegible]. This provision is intended to secure that this return on the delivery of a claim is only done after the work has been completed, and is recognised by the requisitions that government departments and Commonwealth Employees Compensation Boards claims for liens, upon the surrender of the guarantee that their wages would be paid when settlement has been made with the Commonwealth Railway Company, owner of the building, and it is urged by remainders' counsel that this same object is met by the lien of the labourer, and that lien differs in degree the duty of the guarantee to retain sufficient money to pay their claims. [illegible] there is considerable force in this argument. It is pointed out that the statement contained in the letter of instruction is not sufficient specification which is evidence even though it was not shown to. Section 5 of the Mechanics' Lien Act (chap. 89, Illinois Statute Ann Stats., 1934) provides that before the owner shall pay any amount to the contractor in small negotiations [illegible] under oath, and does. It requires the owner to retain enough of any money to pay the claims of those named in the statement. It is argued that the statement thus performs two functions, namely, (1) it is a statement to the contractor that he owes for labor and materials only the amounts specified and is entitled to be paid that part of the amount due on his contract in excess of the claims for labor and materials shown in the statement, and (2) that it is evidence of the claims of the persons named and consequently an admission of liability that would be competent evidence against under oath or not. Sec. 6, which provides for notice to be given by the claimants, does not require that it be given on the time that is used to qualify [illegible] the requires it to [illegible] by the person doing labor or furnishing materials [illegible]. Moreover, under Sec. 6, it is not necessary that claimant should sign the notice, but only that he

shall "cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner," within 60 days after completion. The document signed by the Henderson Plastering Company, November 15, 1935, complied with this requirement of the statute. Under the averment of the answer it must be assumed that the claimants contacted the garnishee before that time and were demanding their money, and that they refrained from filing their claim for a lien upon the assurance of the garnishee that it would withhold sufficient sums to pay their claims.

It is conceded that the Henderson Company had not paid these employees who performed labor on the improvement in question. Consequently, it could not recover from the garnishee because the statute requires the garnishee to retain sufficient money to pay wage claims, especially after garnishee had been notified that the laborers were unpaid, and the respective amounts due them. The statement required by the statute was received in the form of a letter within 60 days after the work was completed and thereafter Henderson Company could not have recovered from the garnishee the sum withheld; or if the garnishee had then paid the Henderson Company it would have done so at its peril and been liable to pay a second time; and since the Henderson Company was not entitled to recover against garnishee the plaintiff was in no better position. It was so held in Hibernian Banking Ass'n v. Morrison, 188 Ill. 279, where the court stated the general rule to be that "a judgment creditor garnisher cannot recover from a garnishee anything which the judgment debtor could not himself recover." This rule was approved in Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137, where the garnisher had recovered judgment against one Allen arising out of an automobile accident. The garnishee

had insured Allen against liability for accidents, one of the conditions of the policy being that the assured would co-operate in the defense of any action brought against him. Allen refused to co-operate, as agreed, and the garnishee contended it was thereby relieved of liability under its policy. In sustaining that contention the court said (p. 139): "This is a garnishment proceeding, and it is elementary that plaintiff in error could not recover against defendant in error if Allen could not do so."

The garnishee's answer apprised the plaintiff and the court that the laborers were employees of the Henderson Company and had wages due and unpaid for work done in performance of the contract with garnishee, and that the laborers were demanding their pay and claimed a lien on the funds. Under the circumstances, the court should have required that they be given notice of the proceedings and an opportunity to maintain their rights as provided by sec. 11 of the Garnishment act. (Illinois State Bar Stats., 1935, chap. 62.) To enter judgment affecting their interests without requiring that notice be issued and served upon them constituted error. (Simpson v. Amstutz, 248 Ill. App. 43; Fry v. Radzinski, 219 Ill. 520; Siegel v. Moses, 159 Ill. App. 624; Chott v. Tivoli Amusement Co., 82 Ill. App. 244.)

Under the proceedings had it was incumbent upon plaintiff to move that such notice be given to the laborers, and having failed to do so the laborers were never afforded an opportunity to present their claims. Judgment of the municipal court is therefore reversed and the cause remanded with directions to proceed further in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

38964

53

CLARA WAPNEKE, Administratrix of the Estate of FRANK WAPNEKE, deceased,
Appellant,

v.

HENRY A. TORSTENSON,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

289 I.A. 6[illegible]3

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover damages for the wrongful death of her husband. The action was brought for the benefit of herself, as widow of the deceased, and for his minor children. At the close of plaintiff's evidence defendant filed a written motion to exclude the evidence and to instruct the jury to find defendant not guilty. The trial court allowed the motion and directed the jury to find the defendant not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The amended complaint charges, in substance, that on June 28, 1934, defendant was driving an automobile in a northwesterly direction over and along Higgins Road near the intersection of Higgins Road and Cumberland avenue, both public highways in Cook county, Illinois; that Higgins road runs northwest and southeast, and Cumberland avenue runs north and south; that plaintiff's intestate was driving another automobile on Higgins road, a short distance northwest of Cumberland avenue, and was then and there in the exercise of due care and caution for his own safety; that defendant caused or permitted his automobile to strike the automobile which plaintiff's

intestate was driving so that plaintiff's intestate was injured, as a result of which he died, on July 7, 1934; that defendant, at the time in question, negligently and carelessly drove and operated his automobile; that he negligently and carelessly drove his automobile at a speed greater than proper, having regard to the traffic and use of the way; that he negligently and carelessly drove his automobile at a dangerous rate of speed; that defendant negligently and carelessly failed to keep a proper lookout, so that he failed to see plaintiff's intestate, who was lawfully on the highway. The complaint alleges that the deceased left him surviving his widow and three children, all minors, to whose support he had contributed, "wherefore, plaintiff asks judgment against the defendant for Ten Thousand Dollars." The answer of defendant states, in substance, that he was not guilty of the acts charged in plaintiff's complaint, nor was the alleged accident and resulting death caused through any negligence on his part, but that, on the contrary, the alleged accident, injury and resulting death were caused through the sole fault and negligence of plaintiff's intestate.

The trial court was of the opinion that the evidence failed to show due care on the part of plaintiff's intestate; that there was no evidence tending to show that defendant was guilty of negligence; and that there was no evidence tending to prove a proximate causal relationship between intestate's injuries sustained in the accident and his death.

Plaintiff strenuously contends that she made out a clear, prima facie case against defendant, that the questions determined by the court upon the motion were questions of fact to be determined by the jury, and that the trial court was guilty of a serious error in directing a verdict for defendant.

The law applicable to defendant's motion is well settled.

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296-7.)" Mahan v. Richardson, 284 Ill. App. 493, 495.)

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petro v. Mines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.)

See, also, the late opinion of the Supreme court in Ziraldo v. Lynch Co., 365 Ill. 197, wherein it is stated (pp. 199-200):

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we cannot reject testimony as improbable unless it is contrary to some natural law. Zetsche v. Chicago, Peoria and St. Louis Railway Co., 238 Ill. 240."

"A motion to instructed the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all [illegible] therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory [illegible] explanatory circumstances must be rejected. The question [illegible] [illegible] tending to prove the plaintiff's [illegible]. In reviewing the ruling of the court on [illegible] — we can look only at that which is favorable to [illegible]. Yess, [illegible] Ill. 414; [illegible] Ill. 409.' (Hunter v. Troup, 315 Ill. 293, 296-7.)" [illegible] v. Schneider, [illegible].

"The courts have [illegible] negligence are questions of fact for the jury, and so long as a question remains whether [illegible] had performed his legal duty or has observed that degree of care [illegible] imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. ([illegible] v. Schlachtenn, [illegible]; [illegible] Ill. [illegible]) [illegible] there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, [illegible] minds must agree that the defendant was not negligent or that the injury [illegible]. (Petro v. Rimac, [illegible] Ill. [illegible]; [illegible] v. [illegible] Central Hotel Corp., [illegible] Ill. [illegible].)

See, also, the late opinion of the Supreme Court in [illegible] v. [illegible] Co., 405 Ill. 127, decided [illegible] (pp. [illegible]):

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; [illegible] v. [illegible], 369 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant presents for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might have found a verdict for the plaintiff. (Brooks v. [illegible] Co., [illegible] Ill. [illegible]; City of Chicago v. Lavin, [illegible].) [illegible] evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence. (Hanson v. Trowbridge, [illegible] Ill. 471; Chicago and St. Louis [illegible] Co., [illegible] Ill. [illegible]) [illegible] reject testimony as improbable when it is contrary to no known law. Roberts v. Chicago City Railway Co., 262 Ill. 240."

The only living witness to the accident was the defendant, and plaintiff called him as an adverse witness under section 60 of the Civil Practice Act. He testified that he is a painting and decorating contractor, in Chicago, and that he lived in Evanston; that he knew the deceased intimately and saw him frequently; that "before this accident happened his health appeared to be all right. He appeared to be just a normal person. He was a very large man. * * * He never complained to me at any time of any illness. I saw him frequently;" that no one ever told him that deceased had any ailments; that on the evening of June 27, 1934, witness and deceased were together; that witness and deceased drove separate cars; that each was alone in his car; that deceased was in the insurance business and incidentally did a little collecting for defendant and others; that on the evening in question they were engaged in collecting money for defendant; that about midnight they finished their business and started homeward; that deceased was going to his summer home at Gage Lake; that they proceeded along Higgins road; that deceased knew the streets better than the witness and therefore took the lead; that they were to drive on Higgins Road to Cumberland avenue, then cut across to Park Ridge, where deceased would keep on going north and witness would go east to his home; that they both intended to make the turn on Cumberland avenue if they recognized it; that the accident happened on Higgins road, somewhere near Cumberland avenue; that, at the time, deceased was driving his car ahead of the car of witness; that as they came toward Cumberland avenue each car was being driven at the rate of about thirty-five or forty miles an hour; that at the time of the accident and immediately before it there were no other cars around there; that as they approached Cumberland avenue the witness was "fifty to seventy-five, say fifty to a hundred feet,

right in there, behind him;" that the collision occurred after both cars had passed Cumberland avenue, probably seventy-five to one hundred feet beyond it; that witness was driving on the right hand side of the center of Higgins road, which is a wide, paved highway, a state highway, "a two lane highway with a center line," and on each side of the center line there is room for two cars; that both cars, at the time of the collision, were on the proper side of the road; that as they reached Cumberland avenue the witness was from seventy-five to one hundred feet behind deceased; that as the witness came to Cumberland avenue he noticed the intersection and thought that it was Cumberland avenue, and "why didn't Frank turn. I glanced over quickly to see if it was the intersection. As I turned my head back then he had evidently realized he had gone past this intersection, and he stopped with his brakes and I was coming up towards him, and I was probably twenty-five feet from him when I noticed he was stopping, and I slammed on my brakes as quickly as I could, and hit the back of his car square. At the time that I looked towards Cumberland I looked right. At the time that I looked towards Cumberland toward the right I had reached just about the center of the intersection. I was actually on Cumberland at that time. He was still seventy-five to a hundred feet ahead of me. * * * He was slowing up. He was still in motion. As to how fast he was going at the time that I turned my head back, I would judge he was going probably fifteen miles an hour. He was not going fast. He had slowed down from something like thirty-five or forty to about fifteen. When I noticed him, I was about thirty feet from him. But I had not started to slow up as soon as he did. At the time I was twenty-five feet or so behind him, I was seventy-five to a hundred feet northwest of the intersection. From that time until I struck him I would say I went probably fifteen or twenty feet more.

After I struck him I stopped right there. As to how far I pushed him, he rode about, I would say, fifteen feet straight down the roadway. It could not be near seventy-five or a hundred feet after I struck him. His car never came to a stop before I hit it. He was still in motion forward when I hit him. He was going then about fifteen miles an hour. At the time I hit him I had slowed down. When I hit him I was probably going five or six miles an hour faster than he was. I was going about twenty miles an hour, and he was going slower than I was. * * * Mr. McKenna (attorney for plaintiff): Do you remember that I asked you, 'Can you estimate the speed he was going when you did hit,' meaning his car, 'A. I would say probably fifteen to twenty miles an hour.' Do you think that would be correct, fifteen to twenty? The Witness: I would think so. I was going five or six miles an hour faster than he was, whatever his speed was. My brakes were in good condition. The road bed was in good condition. I was driving a 1933, five passenger Buick Sedan. * * * I do not know the time exactly how long it would take me to stop if I knew that I was going to stop. As to the distance, under the above circumstances I would say probably twenty to twenty-five feet. * * * Under the circumstances that obtained that night, and you not expecting anything after you do realize there is danger, then in what distance could you stop at thirty-five or forty miles an hour? A. I suppose it depends on how quickly you put on the brakes. If you know you are going to stop, you put your foot on the brake, and my foot was on the side of the brake. You would have to have ten feet more probably. More than the twenty-five or thirty feet that I was taking. That is merely a guess on my part, I do not know. It was not raining; it was nice weather. Q. Do you remember I asked you at my office when taking this deposition, 'Now going at the rate of thirty to forty miles an

After I struck him I thought maybe there. I'm no hero. I pulled him, he took clumsy, I could see, although Jack gained his down the roadway. It could not be more recently-five or ten minutes at most after I struck him. His car never came to a stop before I hit it. He was still in motion towards me when I hit him. We had been driving about fifteen miles an hour. As we came I hit him I felt [illegible] again. When I hit him I was wondering whether I'd killed an hour faster than he was. I was going about twenty-eight or thirty and he was going about three. [illegible] Madame (hesitancy and faintly): Do you remember what I asked you, 'Can you estimate the speed he was going when you hit him?' Another Pin you, 'A. I could say approximately fifteen to twenty miles an hour.' Do you think that would be correct, fifteen or twenty? The Witness: I would think so. I was going five or six miles an hour faster than he was, whatever his speed was. My brakes were in good condition. The road had been in good condition. I was driving a 1930, five passenger Buick sedan. * * * I do not know the exact distance how long it would take me to stop if I knew that I was going to stop. I do the distance, under the above circumstances. I could say approximately twenty to twenty-five feet. * * * That is the circumstances that obtained that night, and you not expecting anything where you do realize there is danger, then in that at least could you stop at thirty-five or forty miles an hour? A. I suppose it depends on how quickly you put on the brakes. If you have your foot ready to [illegible] put your foot on the brake, and my foot was on the side of the brake. You would have to have your foot ready [illegible]. Have the the twenty-five or thirty feet that I was taking. That is not by guess on my part, I do not know. It was no, taking it according [illegible]. Do you remember I make you at my office when taking the deposition, 'Are you in the habit of thinking to forty miles an

hour, under the conditions that were then prevailing, could you tell about how much distance it would take to stop going at that rate of speed with your car in the condition it was and the road bed in the same condition,' and did you answer, 'Oh, I would say you could stop in, that is a hard thing to say, it depends on how you step on your brakes, I would say fifty feet you could stop.' Do you remember answering that in my office? A. I think so, yes. * * * My front bumper hit the rear of Karneke's car. It hit his rear right square. Then his car rolled along, I would say, maybe fifteen or twenty feet, right straight down the lane, then all of a sudden swerved and went down in the ditch front and first. As to how far the point where I struck him was from the place where he landed in the ditch, as I recall it, it would be about fifteen or twenty feet, hardly that, ten feet. It is not very clear in my mind now. His car went in the ditch straight down. The front end of the car going directly down about a three foot bank, maybe four foot bank, and as it came to the bottom, it tipped against the post. When I struck him I was about seventy-five to one hundred feet north of the intersection. Then he went about fifteen feet more into the ditch." The witness further testified that after the accident he was unable to get the deceased out of the automobile and that he ran to a farm house near by for help; that after securing help the car was placed on its wheels and they got the deceased out of the car; that he then took him to a little hospital in Desplaines. Plaintiff offered evidence to the effect that the deceased was taken immediately to the hospital and put to bed; that he was afterward placed on a stretcher and taken to another hospital, and that until his death, on July 7, 1934, he did not leave his bed save on the occasion when he was taken to the second hospital; that he sustained fractured ribs and a fractured shoulder blade; that he was given in-

jections of various kinds for his heart and the pancreas, i.e., for diabetes; that prior to the accident "his health appeared to be perfect." A physician testified that there might, or could be, with reasonable medical certainty, a causal relationship between the accident and deceased's death. It was a question for the jury to determine, from all the evidence, whether the injuries received by the deceased proximately caused or contributed to his death. See our opinion in Straus Nat. Bank & Trust Co. v. Marcus, 274 Ill. App. 597, where many cases bearing upon the subject are cited.

Plaintiff has cited numerous cases in support of her contention that a clear, prima facie case was made out by the evidence, and that the court erred in directing the jury to find for the defendant. We deem it entirely unnecessary to refer to them. After confining our review of the testimony for plaintiff to the limits prescribed by the settled law of this state, we are satisfied that plaintiff made out a clear, prima facie case against defendant and that the trial court committed a serious error in directing a verdict for defendant. We are at a loss to understand upon what theory of fact or law the court based its ruling. To sustain the instant judgment, under the evidence and the law applicable to the same, would be to deprive plaintiff of her right to a trial by jury.

The judgment of the Superior court of Cook county is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

38975

54

MILTON H. FRIEND,
Appellee,

v.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD. OF PERTH, SCOTLAND,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was tried by the court, without a jury. The issues were found in favor of plaintiff and his damages were assessed in the sum of $1,000. Defendant appeals from a judgment entered upon the finding.

Plaintiff sued on a policy of insurance for damages resulting from a furnace explosion. No point is made on the pleadings. Plaintiff pleaded a waiver of a limitation provision contained in the policy. Defendant admitted the furnace explosion but denied that any damages resulting therefrom were covered by the policy. Defendant further denied that it had waived the limitation provision, and affirmatively pleaded it. Plaintiff had carried a policy of defendant of the same kind as the one in question since 1922.

Defendant contends that "the policy on its face excludes damage from an explosion in the furnace or fire-box part of the boiler." It concedes that the form of the instant policy is the same that it would use to cover a furnace explosion. The first page of the policy contains what is called the "Insuring Agreement," at almost the top of the page. Also on that page appears the following, in boldface type, widely spaced: "(excluding loss of

the kind described in Section II, and excluding loss of the kind described in Section IV)," the word "excluding" being typewritten. Section II and Section IV are on the first page, and defendant concedes that neither excludes a furnace explosion. At the bottom of the page reference is made to Schedule I attached to the policy. Defendant concedes that there is nothing on page one that excludes a furnace explosion. It also concedes that none of the thirteen conditions contained upon page two have any bearing upon its contention. On page three appears what is called a "Schedule." At the top of the page appears the following: "The cast iron boilers covered under this Schedule are designated and described as follows:" (Italics ours.) Then follows a description of the object insured and the location of the same. Then follow four columns headed, respectively, "Steam Piping," "Cracking Coverage," "Furnace Explosion," and "Fuel." In the "Cracking Coverage" column appears the word "Included." A layman reading the language at the top of the "Schedule" page would assume that the sole purpose of the "Schedule" was to describe the object insured. Defendant concedes that this "Schedule" page, standing alone, does not exclude a furnace explosion, but it contends that the following words, "Paragraphs B, C and D printed on the back of this sheet are hereby made a part of this Schedule," at the bottom of the page, direct the attention of the insured to further provisions in the policy. It concedes that paragraphs B and D have no bearing on its contention, but it contends that sub-paragraph (b) of paragraph C notifies the insured that if the word "Included" was not inserted in the column "Furnace Explosion" in the "Schedule," a furnace explosion was not included in the policy. We are not satisfied that sub-paragraph (b), when read by a layman, serves any such purpose. In Kaplan v. United States Fidelity Co., 343 Ill. 44, 48, the court said:

"By its assignment of errors defendant insists upon a

strict construction of the conditions of its policy, but in construing policies of insurance the courts are inclined to lean against a narrow construction. (Terwilliger v. Masonic Accident Ass'n, 197 Ill. 9; Monahan v. Fidelity Mutual Life Ins. Co., 242 Id. 488.) Equivocal expressions in a policy of insurance whereby it is sought to narrow the range of the obligations those companies profess to assume are to be interpreted most strongly against the company. (Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Schroeder v. Trade Ins. Co., 109 Id. 157.) The contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity. Healey v. Mutual Accident Ass'n, 133 Ill. 556."

In Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 647, the court said:

"It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster."

In Miolkowski v. Continental Casualty Co., 284 Ill. App. 505, 516, the court said:

"An insurance company has no right to so phrase provisions in its policies that the assured will likely be misled thereby."

If defendant intended to protect itself against liability from a loss resulting from a furnace explosion, it could have easily so provided in the exclusion clauses on page one, by apt words that would have plainly apprised the assured that the policy did not cover any loss resulting from a furnace explosion. The labored argument of defendant, the devious way in which it makes the ambiguous language of sub-paragraph (b) an excluding provision, tend to show the weakness of the instant contention. The contract of insurance was drawn by defendant, and if its language is reasonably susceptible of two interpretations, under the settled rule of law that interpretation must be adopted which will not defeat plaintiff's claim. While a careful, skilful insurance lawyer, after a reading of all the parts of the policy, would probably arrive at the conclusion that it was not clear that a furnace explosion was covered by it, we think that plaintiff, a layman, had a right to conclude from a reading of the policy that it covered a furnace explosion.

We find no merit in defendant's contention that plaintiff

has not proven a waiver of the one year limitation provision of the policy. The trial court had a right to find, under the evidence, that defendant's representatives negotiated with plaintiff's representative for a settlement of the claim for a period of a year or more after the explosion, and that defendant did not deny liability under the policy until the one year period fixed by clause 10 had expired. By this conduct defendant waived the limitation provision. (See Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 226; Illinois Live Stock Ins. Co. v. Baker, 157 Ill. 247, 242; Chicago & N. I. R. Co. v. Guaranty Co. of N. A., 207 Ill. App. 483, 489.) The cases cited by defendant in support of its instant contention do not apply, upon the facts.

The judgment of the Superior court of Cook county should be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

39003

55

MATTIE HOLT, a minor, by BESSIE HOLT, her next friend,
Appellee,

v.

MARY SORGE,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in an action of trespass on the case. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of $15,000. The trial court caused a remittitur of $6,000 to be filed and then entered judgment in the sum of $9,000. Defendant appeals.

The declaration alleges, in substance, that about April 20, 1932, defendant owned and controlled a certain flat or apartment building, consisting of several flats or apartments, which were rented to divers persons, and that plaintiff resided in one of the apartments with her parents; that in the rear of the apartment was a wooden porch on the outer side of which was a wooden railing, which porch and railing were controlled by defendant and were used by the tenants in the building, including plaintiff; that defendant carelessly and negligently allowed the railing of the wooden porch to become and remain in a damaged, decayed, rotten and unsafe condition, although defendant had notice of its unsafe condition or by the exercise of ordinary care should have had such notice, and that plaintiff, a minor of the age of seven years, while in the exercise of that degree of care which a child of her age, experience and capacity would exercise for her own safety, was lawfully upon said porch, the wooden railing broke and gave way, by reason of defendant's carelessness and negligence, whereby plaintiff "was thrown and fell off said porch a great distance to the ground to-wit forty feet." The declaration further alleges

that by reason thereof plaintiff sustained certain physical injuries, describing them, and that she suffered and will suffer severe pain and loss of health; that she has been permanently maimed and crippled, and has sustained damages in the sum of $50,000. To the declaration and an additional count filed defendant filed a plea of the general issue, so that the ownership and control of the property by defendant was conceded.

Defendant contends: "I. It was error prejudicial to defendant for the Court to admit evidence of the fact, that including the building where the accident happened, she owned fifteen buildings. This was evidence of the wealth or financial standing of the defendant. II. It was prejudicial error for the court to allow plaintiff's counsel over the objection of defendant, to make remarks in his address to the jury, concerning (a) The death of plaintiff's mother, (b) Whether plaintiff would be able to or afford to get any food. III. The admission of evidence by the Court over the objections of the defendant with reference to what effect, if any, the injury would have upon the plaintiff in bearing and delivering children was prejudicial error. That evidence was speculative. IV. Other incompetent evidence offered by plaintiff was allowed in evidence over defendant's objection. Numerous motions to strike evidence were allowed by the Court, but the receipt of the evidence undoubtedly had its effect upon the jury, so that defendant did not have a fair trial. V. The Court compelled a remittitur of $6,000 from the verdict of $18,000 returned in this case. Such remittitur did not cure the errors in the admission of evidence and the argument of counsel set forth. VI. The verdict, after the remittitur of $6,000 is still excessive."

An examination of the six contentions discloses that the defendant does not contend (a) that plaintiff failed to make out a prima facie case, (b) that the verdict is against the manifest

weight of the evidence, and (c) that the court did not fully and fairly instruct the jury. The contentions raised relate solely to the question of damages. To quote from defendant's brief: "The issue here is whether the Court erroneously admitted evidence prejudicial to defendant, and allowed plaintiff's counsel to make prejudicial statements to the jury. And whether these errors which resulted in an excessive verdict against defendant, were cured by the remittitur required by the Court."

Four witnesses testified for plaintiff as to the manner of the accident; none testified for defendant. Eleven witnesses, called by plaintiff, testified to the effect that rails were out of the bannisters, that the boards were rotten, and the nails rusty. Fred C. Sorge, son of defendant, "managed the building." Two witnesses testified that prior to the accident they called his attention to the decayed and rotten condition of the rails and the bannisters, and told him that the porches at the back were in a decayed and dangerous condition and that the tenants were complaining about them, and that he answered that he knew they were in that condition and that he would fix them as soon as he could. The evidence is uncontradicted that after the accident there were three of the panels of the bannisters upon the ground where the child struck. Five witnesses, called by defendant, testified that the rails in the bannisters on the connecting porch were sound and that none was missing. It is clear, therefore, why defendant does not contend that the finding of the jury as to the manner of the accident and the condition of the porch is against the manifest weight of the evidence. We are satisfied that an honest, intelligent jury could not have returned a verdict for the defendant.

Prior to the accident the minor was a strong, healthy child. She fell sixteen feet from the porch onto concrete steps and a sidewalk. She was lying, after the accident, with part of

her body upon the sidewalk and her head on the concrete steps. She was bleeding from her mouth, nose and ears. She was in bed when the family physician saw her, within an hour after the accident. He found the following injuries: A deep laceration of the knee joint, a bruise on the chest, a bruise on the back below the waist. There were lacerations on the legs and a swelling of both jaws. There was a bruise back of the head in the occipital region. He sewed up the lacerations, sterilized and dressed the injuries, bandaged the legs, applied local medicine to the bruises and gave internal medicine. Blood was running from her ears and after cleaning them he found that both ear drums were ruptured. He found great swelling over the joints of the jaws, what is called articulation, and also tenderness. Five teeth were knocked out and two or three others were split. The gums were torn a little from the teeth. He did not find any dislocation of the spine, but "found considerable amount of tenderness and some swelling which indicated that it had been wrenched, twisted, traumatism of some type, due to the impact." The same physician examined the child a week before the trial of the cause. Questioned in respect to her condition he testified: "There was still tenderness in the lumbar region of the back and ankylosis of the jaws;" that "ankylosis is the uniting of the two bones that form the joint, due to the undergrowing of scar tissue, fibrous bones which unite the two surfaces of the jaw." She has an imperfect gait in walking. She lists her right side in walking, so that one shoulder is lower than the other. The jaw has about five-sixteenths of an inch opening between the teeth, and it has no lateral movement. It has a vertical motion of about five-sixteenths of an inch; the normal motion would be about two and one-half inches. The ankylosis of the jaw is permanent. X-ray pictures of the child had been taken and another

doctor, testifying as to what he found in the pictures, stated that he found an abnormal relaxation of the articulation between the left side of the pelvis and the sacrum; a narrowing of the pelvis in the region of the left center line, nearer the median line on the right, producing an overtilting of the pelvis; dislocation of the lower jaw on both sides and its articulation with the skull, and anterior dislocation; and a sclerosis condition in the upper part of the lower jaw bone. Still another doctor testified that he examined the minor about nine months before the trial and found, objectively, that there was a rupture of the left ear drum, ankylosis of the lower jaw, deformity at the articulation on both sides of the lower jaw, that due to the ankylosis her jaw would open only about a quarter of an inch, that she had no lateral motion of the jaw due to the ankylosis, that the left side of her pelvis, the hip bone, was higher on the right side because of the upward position of the pelvis; that the left leg was between one-half and three-quarters of an inch shorter than the right leg. This doctor further testified that he was unable to pry open the minor's jaw even with a "tongue de pressure." Her mother testified that the child cannot eat hard food and that it is necessary to prepare a special soft diet for her, that she "slobbers" when she eats; that "she cannot use a spoon directly to her mouth, she turns the spoon sideways." The father testified that one of her legs is shorter than the other. A doctor representing the defendant was allowed to examine the child. His testimony, in substance, is to the effect that plaintiff was a normal child of approximately ten to fifteen years of age and that from his examination of her and the X-ray photograph he was unable to find anything abnormal in her physical make-up. This case was tried by one of the ablest and most experienced judges on the Cook county bench. He saw the child and

heard the testimony in reference to her condition. It is evident that he did not believe the testimony of the doctor who testified for defendant. Neither do we believe that testimony. It was his judgment that $9,000 would probably compensate the child for the injuries sustained. We see no good reason to sustain the contention that the amount is still excessive. The trial judge was of the opinion that the verdict of the jury was not the result of passion and prejudice, and we would not be warranted in holding to the contrary.

We will briefly refer to the points raised by defendant. As to contention I: John S. Price, a witness for defendant, on direct examination testified that he was in the real estate business, connected with Bowers & Baldwin, that he had inspected the building in question prior to the date of the accident and afterward, and that the rails, bannisters, etc., were in good condition. On cross-examination he testified, "We had charge of that building," meaning Bowers & Baldwin. The following then occurred: "Q. For Mrs. Sorge, how many buildings did you manage for Mrs. Sorge? Mr. Biossat (attorney for defendant): It does not make any difference. The Court: He may answer. Witness: About fifteen." He further testified that he did not make all the inspections of the buildings personally; that Mr. Sorge, defendant's son, worked for the firm and was the manager of the building in question and had charge of the collections in the building; that the firm "managed the building generally;" that there were ten employees of the firm who made inspections of the buildings. Defendant contends that the court erred in allowing the question as to how many buildings he managed for defendant to be answered; that the fact that defendant owned fifteen buildings might be considered by the jury as evidence that the defendant was very wealthy, and that questions of that character have been condemned by the courts. The instant

complaint appears to be an afterthought, as the able counsel did not deem the question, at the time it was put, important enough to make an objection to the same. We are satisfied that counsel for plaintiff, in putting the question, did not intend to show the wealth of defendant. The plain purpose of the question was to test the witness's knowledge and memory as to the inspections he claimed to have made of the back porch.

As to contention II: It is a sufficient answer to this contention to say that we have already held that the amount of the judgment is not excessive.

As to contention III: All questions bearing upon the subject as to what effect, if any, the injury would have upon the plaintiff in bearing and delivering children were sustained by the trial court, save one, to which we now refer. During the examination of Dr. Ballinger, a witness on behalf of plaintiff, the following occurred: "Mr. Mascha (attorney for plaintiff): Q. Can you tell us with any degree of medical certainty whether the bony pathology shown in Plaintiff's Exhibit 1 could or would be sufficient to interfere with the patient bearing and delivering children in the normal way? Mr. Biossat: I object to that. The Court: He may answer that; whether it could, might or could. The Witness: Yes, it would have an effect. The Court: It might or could have. The Witness: It might or could. The Court: That is the extent to which you can testify under the law." Counsel for defendant made only a general objection to the question. That is not sufficient. It is the settled rule of law in this state that an objection to the basis of a hypothetical question must be specific (Chicago Union Traction Co. v. Roberts, 229 Ill. 481), so that improper matter may be eliminated from the question or essential matters included in it. Objections to hypothetical questions put

to expert witnesses must specifically point out the grounds thereof. (Rye v. Clark, 193 Ill. App. 505.) An objection to a hypothetical question is limited to the ground specified. (Todd v. Chicago City Ry. Co., 197 Ill. App. 544. See also Mahannah v. Herzfeld, 274 Ill. App. 97, 103.) As stated by our Supreme court in Riverton Coal Co. v. Shepherd, 207 Ill. 395, 397, where the objection is not specific and does not point out the vice of the question, it is not the duty of the trial court to go through the record to ascertain if the question is a proper one. The criticism now made of the question is that there was no evidence upon which to base the question. Even if the present criticism were justified it would avail the defendant nothing as it was the duty of her counsel to call the attention of the court to that fact at the time of making the objection. (See Chicago Union Traction Co. v. Roberts, 131 Ill. App. 476.) However, there was sufficient evidence in the record upon which to base the question.

We have carefully considered the points raised in support of contention IV and find no substantial merit in any of them. Some of them are so lacking in merit that it is surprising that they should have been made.

What we have already said disposes of points V and VI.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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39125

WILLIAM L. LEWY and
SIGMUND ROTHBLUM,
Appellees,

v.

WESTERN UNION TELEGRAPH CO.,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

WILLIAM L. LEWY and
SIGMUND ROTHBLUM,
Cross-Appellants.

269 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was tried by the court without a jury, the issues were found in favor of plaintiffs, and their damages were assessed at $500. Defendant appeals from a judgment entered upon the finding. Plaintiffs have prosecuted a cross-appeal, praying that the amount of their damages be increased.

Plaintiffs were copartners, engaged in importing and selling diamonds. Rothblum was the buyer and Lewy the salesman. The suit was based upon a cablegram, dated June 14, 1935, sent by Lewy, in Chicago, to Rothblum, at Antwerp, Belgium. The message as filed with defendant read:

"S. Rothblum
Diamant Club
Antwerp Belgium
Sold 10000 mailed 4000 robbed in Chicago of around 30000 feeling well inform family no trouble insurance being taken care of dont worry.
William Lewy"

Defendant, in transmitting the message from Chicago to New York, made it read:

"S. Rothblum Diamant Club Antwerp
"Sold 1000 mailed 4000 robbed in Chicago of around 3000 feeling well inform family no trouble insurance being taken care of dont worry

William Lewy"

Defendant's answer denies practically all of the allegations of the complaint, including the one that alleges the wording of the message as it was delivered to defendant. However, the manager of defendant's office at the Congress hotel, who received the message from Lewy, admitted that when she received the message it was worded as plaintiffs claim; and defendant, prior to the trial, admitted negligence in transmitting the message and tendered plaintiffs a check for $3.20, the amount of the charge it made for the transmission of the message, which tender was refused. The evidence of both sides shows that Lewy frequently sent cablegrams to Rothblum through defendant's office at the Congress hotel. Plaintiffs had been purchasing practically all of their diamonds in Antwerp, as it cost them approximately ten per cent more to purchase like diamonds in New York, and they claim that due to defendant's negligence in the matter of the wording of the cablegram Rothblum, the buyer of the partnership, deemed it necessary to go to New York; that plaintiffs were therefore compelled, during the months of July and August, 1935, to make ninety-five per cent of their diamond purchases in New York, at the New York prices, and they thereby suffered damages in the amount of $2,024.22; that because of the time consumed by Rothblum in traveling from Antwerp to New York and return, the partnership sustained a loss of profits which it would otherwise have earned during that time.

Defendant argues that the cablegram does not show upon its face that it relates to a commercial transaction and that therefore damages suffered as a result of the errors in the transmission of the message cannot be recovered. After a careful consideration

of the rather strained argument of defendant in support of this contention, we find it without merit. We think that defendant should have known from the phraseology of the message that it related to business and that a pecuniary loss would probably result from an incorrect transmission.

Defendant introduced in evidence its rules, regulations, tariffs and classifications that it had filed with the Federal Communications Commission, and it contends: "That portion of the tariffs which the defendant contends is applicable in this case is that this was an unrepeated message and that the company was not liable for transmission at the unrepeated-message rate beyond the sum of $500, nor in any case for delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages." As the trial court fixed the damages at $500 it is unnecessary for us to consider the contention of defendant as to the maximum sum that could be awarded for damages. There is no claim that there was any delay in the delivery of the message, and defendant's argument that it was a code message, the meaning of which was unknown to it, is without merit. Indeed, the able counsel for defendant contended before the trial court that the cablegram was not a code message.

The major contention of defendant is that "plaintiffs' damages are too speculative, contingent and conjectural." The case was tried by an able and experienced judge and at the conclusion of the evidence he made the following statement: "Here is the way I feel about it: Because of the rather unsatisfactory character of the proof as to what the damages definitely are, - I am not very satisfactorily convinced on that - it makes me give greater weight to the limitation of $500, and I think I would be generous enough in giving that limit of recovery, if I accept the defendant's theory

of what the limit is. I am not sure whether he is right in his contention, but I think $500 is fairly ample, so that will be the finding for the plaintiff." We see no good reason to change the amount of the damages fixed by the trial court. If it be granted that the evidence as to the alleged damages is of a somewhat unsatisfactory character, nevertheless, we think, in view of all of the facts and circumstances, defendant should be satisfied with the finding. We also think that we would not be justified in sustaining the contention of plaintiffs that their damages should be increased. Indeed, plaintiffs state in their brief that if their motion to dismiss defendant's appeal is allowed they wish to dismiss their cross-appeal. In view of our holding that the amount allowed for damages is sufficient, it will not be necessary for us to consider plaintiffs' contention that the defendant is liable for damages sustained beyond the sum of $500.

Plaintiffs have filed a motion to dismiss defendant's appeal upon the ground that it has not been perfected in accordance with the provisions of the Civil Practice Act and the rules of practice of this court. The point made is that defendant did not file its praecipe for record within the time allowed by the rules. This court has heretofore refused to sustain like contentions. The motion of plaintiffs to dismiss the appeal is denied.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend J., concur.

[illegible]

[illegible]

[illegible]

39194

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN JACOBSON et al.,
Petitioners,

v.

THE CITY OF CHICAGO, a municipal
corporation, et al.,
Defendants.

EDWARD J. DOYLE et al.,
(Petitioners) Appellants.

THOMAS F. REILLY and JOHAN
WAAGE,
(Attorneys' Lien Claimants)
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

289 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from an order entered July 6, 1936, denying the petition of Edward J. Doyle et al., appellants, to vacate and set aside an order entered June 2, 1936, directing the defendants to pay to attorneys Thomas F. Reilly and Johan Waage, appellees, certain moneys as fees under a claim for attorneys' lien.

On September 21, 1934, a petition for mandamus, on the relation of 156 petitioners named therein, was filed against City of Chicago, Edward J. Kelly, mayor; Arthur Seyferlich, commissioner of fire; Robert B. Upham, comptroller; and James A. Kearns, treasurer, to compel the payment to petitioners of fourteen days' pay that had been deducted from their salaries in 1931. Appellees, Thomas F. Reilly and Johan Waage, were the attorneys representing the petition. Summons was issued and returned and there was filed, on behalf of all

the defendants, a general and special demurrer to the petition. On May 11, 1936, by leave of court, an amendment to the petition was filed, which added 341 petitioners to the petition. The general and special demurrer to the petition was ordered to stand as a general and special demurrer to the petition as amended. In that state of the record the said attorneys, apparently without notice to the petitioners, filed, on May 27, 1936, a petition in the said cause which, omitting the verification, is as follows:

"Thomas F. Reilly and Johan Waage, Petitioners, respectfully represent that they are duly licensed attorneys at law of the State of Illinois; that as such attorneys they duly undertook employment by all of the Plaintiffs in the above entitled cause, for recovery of fourteen days pay deducted from the salaries of the said Plaintiffs, for and during the year 1931, and then and there agreed to a compensation for their services in that behalf, of a sum equal to ten (10%) per cent of the amount recovered for, due or paid to each such Plaintiff, following such employment.

"Petitioners further represent that they have duly served a Notice of an attorney's lien under the said employment upon the City of Chicago, a Municipal Corporation, and Edward J. Kelly, mayor of the said City of Chicago.

"Petitioners therefore pray that an Order be entered fixing and allowing them the sum equal to the ten (10%) per cent of the monies to be paid each of said Plaintiffs for the fourteen (14) day deduction made from each of said Plaintiffs during the year 1931 and that the proper officials of the City of Chicago be instructed to deduct such ten (10%) per cent from the amounts so due and payable to each of said Plaintiffs and pay the same direct to said attorneys.

"Thomas F. Reilly
"Johan Waage."

On June 2, 1936, the same attorneys filed the following:

"To: City of Chicago, a Municipal Corporation
Edward J. Kelly, Mayor of the City of Chicago,

"Please take notice that the undersigned, attorneys at law of the State of Illinois, have been retained and employed by the persons, or their representatives, whose names are listed below; retired members of the Fire Department of the City of Chicago; to demand, prosecute and collect from the City of Chicago, a Municipal Corporation, their respective claims, demands and causes of action of such persons, against the said City of Chicago, for the fourteen (14) days deduction withheld from their respective salaries for the year 1931 and that each of such persons have agreed to pay the undersigned as a fee for their services in that behalf, a sum equal to ten (10) per cent of the respective sums of money recovered for or to be paid such persons by reason of the deductions aforesaid.

the defendants, a criminal and special criminal in this jurisdiction.

On May 11, 1936, by leave of court, an amendment to the petition was filed, which added 321 petitioners to the petition. The general and special demurrer to the petition was overruled on a general and special demurrer to the petition as amended. It was stated at the trial that the record shows that only 41 have notice to the petitioners, filed, on May 27, 1936, a petition in the said cause which, omitting the verification, is as follows:

"[illegible] petition [illegible] petitioners [illegible] represent that they are duly licensed [illegible] in law in the state of Illinois; that on such [illegible] they [illegible] employment by all of the defendants in the above entitled cause, for periods of fourteen days and upwards from the expiration of the [illegible] little, for and during the year 1935, and from the [illegible] a compensation for their services in the [illegible], of a sum equal to ten (10%) per cent of the amount recovered for, and on behalf of each such defendant, respectively, [illegible].

"Petitioners further represent that they have duly [illegible] Notice of an attorney's lien under the [illegible] the City of Chicago, a [illegible] [illegible], [illegible], mayor of the said City of Chicago.

"Petitioners therefore pray that an order be entered [illegible] and allowing them the sum equal to the ten (10%) per cent of the monies to be paid each of said defendants, for the fourteen (14) day detention made from each of said defendants during the year 1935 and that the proper officials of the City of Chicago be instructed to deduct such ten (10%) per cent from the amounts to be and payable to each of said defendants and pay the same direct to said attorneys.

"[illegible]
"[illegible]."

On June 2, 1936, the same attorney, filed the following:

"To: City of Chicago, a municipal corporation
Edward J. Kelly, Mayor of the City of Chicago.

"Please take notice that the undersigned, attorneys at law of the state of Illinois, have been retained and employed by the persons, or their representatives, whose names are listed below; retired members of the Fire Department of the City of Chicago; to demand, prosecute and collect from the City of Chicago, a municipal corporation, their respective claims, demands and causes of action of such persons, against the said City of Chicago, for the fourteen (14) days deduction withheld from their respective salaries for the year 1935 and that each of such persons have agreed to pay the undersigned as a fee for their services in the premises, a sum equal to ten (10) per cent of the respective sums of money recovered for, or to be paid such persons by reason of the [illegible] demand.

"You are further notified that the undersigned claim a lien under 'an act creating attorneys lien and for the enforcement of same.' (In force July 1, 1909, Statutes of Illinois) equal to ten per cent (10%) of the respective sums of money due, owing or to be paid the persons so named and listed respectively, by reason of the deduction or withholding of fourteen (14) days pay from said persons, during the year 1931 as aforesaid.

"The names of the persons represented by the undersigned against whom this attorney's lien is claimed are hereby listed as follows:

(All the parties on whose behalf the writ of mandamus is sought are here named.)

"Please govern yourselves accordingly.

"Dated May 8, 1936.

"Respectfully submitted,

"Thomas F. Reilly,
"Johan Waage,
"Attorneys for the above named Plaintiffs and persons."

On the same date they filed the following:

"To: The City of Chicago, a Municipal Corporation
and
Barnet Hodes, Corporation Counsel

"Please take Notice that we have duly filed our Petition in the above entitled cause for a judicial determination under notice, of attorney's lien, heretofore served upon the City of Chicago and that on Tuesday June 2, 1936, at the opening of Court, we shall appear before Hon. Judge Harry Fisher, and ask the Court to enter an Order in said cause in accordance with the prayer of said Petition, at which time and place you are invited to be present.

"Thomas F. Reilly,
"Johan Waage"

On the same date the following was filed in the cause:

"ANSWER TO PETITION FOR FIXING ATTORNEYS' FEES UNDER ATTORNEYS' LIEN NOTICE.

"Now comes the Plaintiffs in the above entitled cause and each of them by John Barrett, their duly authorized agent and for answer unto the petition of Thomas F. Reilly and Johan Waage, attorneys for Plaintiffs in the above entitled cause, for determination of their fees as Attorneys under lien notice, say:

"That said Plaintiffs admit the matters and things set forth and contained in said Petition and admit that said Plaintiffs and each of them agreed to pay said attorneys a sum equal to ten (10%) per cent upon the amount due them for deductions made from their respective salaries in the year 1931.

"All Petitioners named as Plaintiffs in the above entitled cause,

"By John E. Barrett
"Their duly authorized agent."

The verification to the answer, made by Barrett, states, "that he is the duly authorized agent of the Petitioners in the above entitled cause; that he has subscribed the foregoing Answer on behalf of said Petitioners as their duly authorized agent." On the same date the following order was entered:

"Upon the petition of Thomas F. Reilly and Johan Waage, attorneys at law, for determination and adjudication of fees of said attorneys for services under attorneys' Lien Notice which has been heretofore served upon the Defendants and now exhibited to the Court and filed herewith and upon due Notice to said Defendants through Barnet Hodes, Corporation Counsel of the City of Chicago, attorney for said Defendants, and upon testimony and evidence produced and heard in open court in support of the said Petition and the Court being fully advised in the premises:

"It Is Ordered By The Court that the compensation and fee for services of said Thomas F. Reilly and John Waage, rendered plaintiffs in the above entitled cause under the terms of the employment agreement between the said attorneys and said Plaintiffs; be and the same is hereby fixed and determined at a sum equal to ten (10%) per cent upon amounts due and payable by the City of Chicago, a Municipal Corporation, Defendant, to each of said Plaintiffs, by reason of the deductions of fourteen (14) days pay made and withheld from their salaries during the year 1931.

"It Is Further Ordered that the City of Chicago, a Municipal Corporation, and their duly authorized officials be, and they are hereby authorized and directed to deduct said sum of money as equals ten (10%) per cent upon the amounts due and payable to each of said Plaintiffs, from the amounts due them for the deductions aforesaid, and pay the same in equal shares to said Thomas F. Reilly and Johan Waage respectively, in full, for their services in that behalf, and pay the balance thereof to each of said Plaintiffs."

After due notice had been served upon Attorneys Reilly and Waage the following petition was filed, on July 2, 1936:

"Your petitioners, Edward J. Doyle and Allen V. Prunty, respectfully represent unto this honorable court that they are retired City Firemen and are named as plaintiffs in the above entitled cause.

"Your petitioners further represent in behalf of (here follow the names of all the other appellants) named as plaintiffs in the mandamus petition heretofore filed in the above entitled cause, that on the 2nd day of June, A. D. 1936, this honorable court entered an order directing the said defendants, City of Chicago, a Municipal Corporation, Edward J. Kelly, Mayor of the City of Chicago, and their duly appointed officials to deduct the sum of money as equals ten per cent (10%) upon the amounts due and payable to each of said plaintiffs from the amounts so due them by reason of the deduction of fourteen (14) days pay made and withheld by the City of Chicago from their salary or salaries for the year 1931, and pay same in equal shares to said Thomas F.

"[illegible]

The verdicts in the [illegible], and by [illegible], [illegible], that he is the only [illegible] heir of the [illegible] in the above entitled cause; that he has [illegible] the [illegible] on behalf of said petitioner, [illegible] their [illegible] [illegible]."

The case date the following order was entered:

"Upon the petition of Thomas A. Melling and Robert [illegible], attorneys at law, for determination and adjudication of the [illegible] said attorneys for services [illegible] petitioner [illegible] has been heretofore served upon the defendants and [illegible] to the court and filed herein, and upon the motion to make [illegible] through Bernard Korzen, [illegible] of the [illegible] of Illinois, attorney for said defendants, and upon the [illegible] evidence produced and heard in open court in support of the said petition and the Court being fully advised in the premises

"It is ordered by the Court that the compensation and fees for services of said Thomas A. Melling and Robert [illegible], rendered plaintiffs in the above entitled cause under the terms of the employment agreement between the said [illegible] and said plaintiffs; be and the same is hereby fixed and determined [illegible] equal to ten (10%) per cent upon amounts due and payable by the City of Chicago, a municipal corporation, [illegible] of said plaintiffs, by reason of the judgments of [illegible] days pay made the minimum less [illegible] the [illegible].

"It is Therefore ordered that the City of Chicago, a municipal corporation, and their [illegible] officials be, and they are hereby authorized and instructed to retain out of money or equal[illegible] ten (10%) per cent upon the amounts due and payable to said plaintiffs, from the moneys due them for the [illegible] and pay the same in equal [illegible] to said [illegible], [illegible] [illegible] respectively, in full, for their services in said [illegible], and pay the balance thereof to said or said plaintiffs."

After due notice had been served upon [illegible] and [illegible] the following petition was filed, on July 3, 1956:

"Your petitioners, [illegible], respectfully represents unto this Honorable Court that they are retained City Attorneys and are named as plaintiffs in the above entitled cause.

"Your petitioners further represent in behalf of (Item follow the names of all the other [illegible]) named as plaintiffs in the mandamus petition heretofore filed in the above entitled cause, that on the 2nd day of June, A.D., 1956, this Honorable Court entered an order directing the said [illegible], City of Chicago, a municipal corporation, Edward H. Kelly, Mayor of the City of Chicago, and their duly appointed officials to deduct the sum of money as equals ten per cent (10%) upon the amounts due and payable to each of said plaintiffs from the amount so due them by reason of the decision of [illegible] (14) days pay made and allowed by the City of Chicago from their salary or [illegible] for the year 1951, and pay same in equal amounts to said [illegible] a.

Reilly and John Waage, attorneys, respectively in full for their services in that behalf and pay the balance thereof to each of said plaintiffs.

"Your petitioners further represent that no contract of employment exists or existed between the said attorneys, Thomas F. Reilly and John Waage, and the above named plaintiffs, and that there is no agreement or was there ever any agreement entered into by the parties hereto and the said attorneys whereby there is fixed and determined that a sum equal to ten per cent (10%) upon amounts due and payable by the City of Chicago, a Municipal Corporation, defendant herein, to each of said plaintiffs by reason of the deductions of fourteen (14) days pay made and withheld by said City of Chicago, a Municipal Corporation, from their salary or salaries during the year 1931.

"Your petitioners therefore pray that the order heretofore entered on the said 2nd day of June, A. D. 1936, be vacated and set aside and that the notice of attorneys' lien heretofore filed with the City of Chicago, a Municipal Corporation, by the said Thomas F. Reilly and John Waage, attorneys in said mandamus petition, be declared null and void and of no effect, and that the check for said 1931 salary or salaries, belonging to said petitioners be released by the said Comptroller of the said City of Chicago, a Municipal Corporation, to the petitioners herein.

"Allen V. Prunty,
"Edward J. Doyle,
Petitioners."

The verification to the petition is made by Prunty and Doyle. On July 6, 1936, counsel for Thomas F. Reilly and Johan Waage served notice upon counsel for appellants that on Monday, July 6, 1936, he would file the answer of Reilly and Waage to appellants' petition and would at the same time ask that an order be entered denying the prayer of the petition. On that date the following answer was filed:

"Now come Thomas F. Reilly and Johan Waage, Respondents, and for answer to the Petition of Edward J. Doyle and Allen V. Prunty, filed in the above cause on July 2, 1936, they and each of them say:

"1. Admit that the said Petitioners and (here are named all the other appellants) are named as Plaintiffs in the Mandamus Petition filed in the above entitled cause and further admit that on June 2, 1936, an Order was entered herein, directing the Defendants, the City of Chicago, a Municipal Corporation, and Edward J. Kelly, Mayor of the City of Chicago and their duly authorized agents and officials, to deduct the sum of money equal to ten (10%) per cent upon the amounts due and payable to each of the Plaintiffs in the above entitled cause, by reason of a deduction of fourteen (14) days pay withheld by the City of Chicago, from the respective salaries of the Petitioners in the above cause, for the year 1931 and that the said ten (10%) per cent be paid in equal shares to those respondents for their services in behalf of the Plaintiffs in the above entitled cause.

"2. Further answering, these respondents aver that they are the attorneys of record for the Plaintiffs in the above entitled cause; that the said cause is a Mandamus Proceeding, filed by the Plaintiffs on their behalf and on the behalf of all others similarly situated and in a representative proceeding; that the Petitioners Edward J. Doyle and Allen V. Prunty and (here are named all the other appellants) on whose behalf they filed their said Petition to vacate the order of June 1, 1936, as aforesaid will receive the benefit of the said proceeding and receive from the City of Chicago in accordance with the Judgment of this Court the fourteen (14) days pay unlawfully withheld by the City of Chicago for salaries during the year 1931; that the deduction of ten (10%) per cent due these respondents as attorney's fees, constitutes a part of the expense of the trial of the above cause and as such, should be borne by the Petitioners Edward J. Doyle and Allen V. Prunty and those persons on whose behalf they filed their Petition herein on July 2, 1936.

"3. Further answering these Respondents aver that the said Petitioners Edward J. Doyle and Allen V. Prunty and those on whose behalf they filed their said last mentioned petition are to receive the benefit and advantage of the judgment in Mandamus of this Honorable Court and by virtue of the said benefits, they and each of them should in equity and in law, pay their respective pro-rata share of the expenses of the said suit.

"Having fully answered the said Petition, these Respondents and each of them ask that the prayer thereof be denied.

"Thomas F. Reilly
"Thomas F. Reilly
"Johan Waage
By Thomas F. Reilly
"His duly authorized agent,
Respondents.

"Gregory Gelderman,
Attorney for Respondents."

(Here follows the verification.) On the same date the trial court entered the following order:

"This matter coming on to be heard upon the petition of Edward J. Doyle and Allen V. Prunty heretofore filed herein on July 2, 1936, and the verified answer of Thomas F. Reilly and Johan Waage, respondents thereto and the court having read and considered the said petition and answer and having heard counsel in support thereof.

"Doth Find that Thomas F. Reilly and Johan Waage are the attorneys of record for the plaintiffs in the above entitled cause; that the said cause is a mandamus action filed by the plaintiffs on their behalf and on behalf of all other persons similarly situated, to recover from the City of Chicago fourteen (14) days pay or salary unlawfully withheld by the City of Chicago during the year 1931; that the petitioners Edward J. Doyle and Allen V. Prunty and those persons named in their said petition and on whose behalf they filed the same, will receive the benefit and proceeds of the judgment entered in the above cause; that the sum of money equal to ten (10%) per cent upon the amounts due and payable to each of the

plaintiffs and which has been ordered to be paid to the said respondents Johan Waage and Thomas F. Reilly in equal shares and as attorneys' fees for services rendered to the plaintiffs in the said cause, is fair, reasonable and just and that the said sum of money is and constitutes a part of the expense of prosecuting the above cause and the said petitioners Edward J. Doyle and Allen V. Prunty and those persons named in their said petition have had the use and benefit of the services rendered by the respondents.

"Wherefore in consideration of the foregoing it is ordered that the prayer of the petition filed herein by Edward J. Doyle and Allen V. Prunty on their behalf and on behalf of the parties named in the said petition to vacate the order heretofore entered in this cause on June 2, 1936, be and the same is hereby denied."

This appeal is prosecuted to obtain a reversal of that order.

Appellants contend: (1) "In view of the admission in the pleadings [the answer of Reilly and Waage to the petition of appellants] that there was no contract of employment between the claimant attorneys and the appellants it was error for the trial court to enter its order of July 6, 1936, denying the petition to vacate and set aside its order of June 2, 1936, allowing the lien for attorneys' fees. (2) Even if the trial court could regard the averments in the notice and petition for attorneys' lien as denials of the sworn allegations of the petition to vacate and set aside the order of June 2, 1936, allowing the lien for fees, there was then an issue of fact upon which the court should have heard evidence instead of proceeding summarily to enter the order of July 6, 1936, denying the prayer of the petition."

In their notice of attorneys' lien, Attorneys Reilly and Waage base their claim upon an express contract of retainer and employment, as appears from the following language in the notice: "* * * Each of such persons have agreed to pay the undersigned as a fee for their services in that behalf, a sum equal to ten (10) per cent of the respective sums of money recovered for or to be paid such persons by reason of the deductions aforesaid." The petition for lien filed by the attorneys sets up an express contract of retainer and employment.

The answer of "All Petitioners named as Plaintiffs in the above entitled cause," filed by John M. Barrett, "Their duly authorized agent," to that petition admits "that said Plaintiffs and each of them agreed to pay said attorneys a sum equal to ten (10%) per cent upon the amount due them for deductions made from their respective salaries in the year 1931." The order of the trial court fixing the lien is based upon an express contract of employment. The petition of the appellants to vacate the order of June 2, 1936, alleges, under oath, "that no contract of employment exists or existed between the said attorneys, Thomas F. Reilly and John Haage, and the above named plaintiffs, and that there is no agreement or was there ever any agreement entered into by the parties hereto and the said attorneys whereby there is fixed and determined that a sum equal to ten per cent (10%) upon amounts due and payable by the City of Chicago, a Municipal Corporation, defendant herein, to each of said plaintiffs by reason of the deductions of fourteen (14) days pay," etc. The answer of the attorneys to this petition abandons the position that there was a contract of employment between the parties, and seeks to sustain the judgment fixing the lien upon the theory that the mandamus proceeding was "a representative proceeding," that the petitioners, including appellants, "will receive the benefit of the said proceeding," that the ten per cent provided in the order "constitutes a part of the expense of the trial of the above cause and as such, should be borne by" the petitioners. The order entered by the trial court on July 6, 1936, is based entirely upon the new theory advanced in the answer of the attorneys. No evidence was heard, and the order recites that the finding of the court is based upon the petition of appellants and the answer of the attorneys.

The attorneys' lien law, as amended in 1927, provides:

"That attorneys at law shall have a lien upon all claims,

demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action."

(The above provision follows verbatim the act of 1909.) The Supreme court has held that an attorney's lien under the act must be based upon a contract, either express or implied, for fees, entered into by client and attorney. (See People v. Holden, 304 Ill. 394.) The placing of a claim, demand or cause of action in the hands of an attorney for suit or collection constitutes a contract of employment between the client and the attorney, and in such a case, even though there be no express agreement for the payment of fees, an agreement to pay reasonable fees is implied. An attorney may prove his lien by direct or circumstantial evidence, but if there is no employment of the attorney by the alleged client there can be, under the act, no lien for fees. It would be idle to argue that the attorneys in the instant proceeding are entitled to a lien upon the theory of fact advanced in their answer. The contention that this is a representative proceeding is clearly an afterthought, as neither the petition for mandamus nor the amendment thereto purports to be in behalf of any person not named therein.

The record does not show that the petitioners were served with notice that the attorneys would apply for an order fixing their lien. The answer of the attorneys to appellants' petition concedes, in effect, that they were not employed by appellants but that the lien order should be sustained on equitable grounds "by virtue of the said benefits they and each of them" are to receive if a judgment for mandamus is entered in the cause. Notwithstanding the equitable reasons that prompted the trial court to deny the prayer of appellants'

petition, the effect of the ruling is to leave in full force the order fixing the attorneys' lien. As we have heretofore stated, if there is no employment there can be no lien. Because of the nature of the answer to appellants' petition, the order fixing the lien should have been vacated. Even if it were possible to interpret the answer of the attorneys as a denial of the allegations of appellants' petition that there was no contract of employment, it would follow that there was a material issue of fact to be tried. But it seems reasonably clear from the course pursued that the able attorneys sought to avoid a trial of that issue. They seek to sustain the order in question upon the ground that the record fails to show that appellants offeredany evidence to sustain their petition. It is a sufficient answer to this argument to say that because of the nature of the attorneys' answer to appellants' petition no proof was necessary. Indeed, the record shows that the attorneys desired that the matter be determined upon the petition and answer.

The order of the Circuit court of Cook county of July 6, 1936, is reversed, and the cause is remanded with directions to the trial court to vacate the judgment order of June 2, 1936, fixing the attorneys' lien, and for further proceedings not inconsistent with this opinion.

We do not wish to be understood as holding that the attorneys may not assert their right to a lien. If they do so assert, a proper issue can be made up and the question determined by the trial court upon evidence submitted to him.

ORDER OF JULY 6, 1936, REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO VACATE JUDGMENT ORDER OF JUNE 2, 1936, FIXING ATTORNEYS' LIEN, AND FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

Sullivan, P. J., and Friend, J., concur.

39205

58

SAMUEL J. CLAPHAM,
Plaintiff,

v.

ABRAHAM KAPES et al.,
Defendants.

STATE LIFE INSURANCE COMPANY,
a corporation, (Intervenor)
Appellant.

HEITMAN TRUST CO., a corporation, Receiver,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

289 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellant, intervenor in a foreclosure proceeding involving subordinated bonds, appeals from an order granting the successor receiver, Heitman Trust Company, a first and prior lien against the premises in the sum of $771.03 and ordering that a receiver's certificate in that amount issue. Appellant is the owner of the premises by virtue of a master's deed, dated February 29, 1936, issued in another foreclosure proceeding brought by it, on December 29, 1933, in which were involved prior bonds on the premises.

Samuel J. Clapham, plaintiff in the proceeding involving the subordinated bonds, filed his bill to partially foreclose, on February 23, 1931. Appellant was not made a party to that proceeding. A decree of sale was entered in that proceeding and the premises were sold to Clapham for $500. Because of a deficiency decree the receivership was continued during the period of redemption. On June 24, 1932, Division State Bank was removed as receiver and

it was ordered to file a final account and report within thirty days. It did file the account, which showed that the property was being operated at a deficit. The account was approved. Heitman Trust Company, a corporation, appellee, was appointed successor receiver of the premises. On April 29, 1936, the attorneys for appellant served notice on the several counsel in the foreclosure proceeding that they would "present the Petition, a copy of which is herewith served upon you, and shall ask a rule on you to answer same within five days." On the same date an order was entered granting appellant leave to file the petition, and the receiver and other parties to the suit were ordered to answer the same within ten days. The petition alleges, inter alia, that appellant is the owner of the premises in question by virtue of a master's deed duly recorded; that Heitman Trust Company, receiver, is still in possession of the premises; that the last order entered in the cause was on March 3, 1936, approving the receiver's report and account and continuing the matter of the allowance of fees until the termination of the receivership; that the petitioner has, at various times, demanded possession of the premises from the receiver but that it has refused and still refuses to deliver possession to petitioner. The petition prays that petitioner be granted leave "to enter its special appearance solely to file this petition for the purpose of having an order entered in this cause commanding said receiver, Heitman Trust Company, to deliver up possession of the premises." On the same date an appearance was filed for appellant "solely for the purpose of filing its intervening petition." The verified answer of the receiver states that while acting as such receiver it made certain expenditures and repairs to the building, which were reasonable and necessary, and that it duly advised appellant of said expenditures, as will more fully be seen from the

petition filed by the receiver on December 19, 1934, which the receiver by reference incorporates as part of the answer; that appellant is complainant in a case entitled State Life Insurance Company, a corporation, vs. Abraham Kapes et al., in the Circuit court, wherein a bill was filed to foreclose a first mortgage trust deed on the premises in question; that it, Heitman Trust Company, receiver, acting for and on behalf of the court, incurred various debts and obligations in keeping, maintaining and managing the property, and that it advised all of the parties to the proceedings, including appellant, that the premises were operating at a deficit; that various inquiries were addressed to appellant by the receiver informing it as to the deficiency, etc.; that there is a deficit in the receivership account of the sum of $738. The receiver prays that an order may be entered that a receivership certificate shall issue on the property which shall constitute a first and prior lien to any and all incumbrances and liens now existing on the premises in the amount of the deficit. On May 11, 1936, the trial court, at the instance of the attorneys for appellant, entered the following order:

"On motion of St. George and Davis solicitor for State Life Insurance Company, a corporation, and this cause coming on to be heard upon the motion to discharge the Heitman Trust Company, a corporation, as Receiver, and it appearing to the Court that a Master's Deed to the premises has been issued to the State Life Insurance Company, a corporation, and the Court being fully advised in the premises,

"It Is Hereby Ordered that the said Heitman Trust Company, a corporation, as Receiver, be and it is hereby discharged as such Receiver, and that the said Receiver turn over possession of the premises to the State Life Insurance Company, a corporation.

"It Is Further Ordered that the Receiver file his final account within ten days from the date hereof and that the hearing as to the unpaid operating expenses and for the deficiency incurred by the said Receiver and the liability of the parties for the said expenses and deficiency, be and the same is hereby set for hearing on June 1st, 1936, without further notice."

On June 1, 1936, upon motion of the attorneys for appellant, the hearing set for that date was continued until June 18, 1936.

The hearing was formally continued from time to time until on July 15, 1936, the matter came on for hearing before the trial court. No objection was made as to any of the continuances. Appellant was represented at the hearing by Attorney Davis. Prior to the hearing the report of the receiver had been filed and approved. The following is a full transcript of the proceedings:

"Mr. Davis: If the Court please, on this Clapham v. Kapes case your Honor instructed us to get the itemized permanent improvements.

"The Court: Go and put them on the stand.

"Mr. Davis: Now he is here and he actually expended this money.

"The Court: I want to know what the improvements were.

"Mr. Hershenson (attorney for receiver): The reports have been filed already; the Receiver's report showing the expenditures and improvements has been filed, so that is not an issue.

"Mr. Davis: It is just a question of your ruling on whether certain improvements are permanent or not such as window shades and curtain rods and carpeting and janitor's supplies.

"The Court: Gas stoves, refrigerators and that carpenter work.

"Mr. Hershenson: If you included the refrigerators and the gas stoves and carpenter work it will run well over the $666.51 that we claim. The refrigerators were $401.25, the gas stoves were $84.00 and the carpenter work ran somewheres around between eighty and ninety dollars. Then there was some boiler work and plumbing which would bring it up 'way over our total but what we classed as permanent improvements did not include the refrigerators.

"Mr. Davis: They are separate boxes.

"The Court: The Court finds that the Receiver, in order to keep the property in tenantable condition, was obliged to make improvements as follows: He paid $666.51 for heating boiler, for new window frames and porch --

"Mr. Hershenson: For porch repairs and roof repairs.

"The Court: -- For new porches and roof; he was also obliged to expend $84.00 for gas stoves purchased for the kitchens; he was also obliged to pay, during his time, $401.25 for refrigerators in the right management of said property.

"Up to the time that he finally quit the receiver was in arrears or had a deficit of $771.63; no, it was $771.03. It is true that the first mortgage merely stood by while the receiver was keeping the property in tenantable condition; it is also true

that the receiver continued to manage the property after the equity of redemption expired. There were irregularities but they were innocent.

"The first mortgage has received the benefit of these operations of the receiver; that in keeping the property in tenantable condition the receiver has waived any claim for fees and the lawyers for the receiver have waived their claim for fees and the Court thinks the equity of the case requires that the Court's receiver have a certificate for the sum of $771.03, as a prior lien over and above the first mortgage in this cause; the said sum to be applied by the receiver for current bills amounting to $771.03.

"Mr. Hershenson: All right, thank you.

"(Which was and is all the Evidence offered and other proceedings had on the hearing of the above entitled cause.)"

Appellant's notice of appeal states that it will ask this court to reverse the order entered, upon the ground that the lower court had no jurisdiction to enter it. In this court it contends: "2. That after the lower court on May 11, 1936, ordered the receiver to turn over the premises to intervenor, it lost all further jurisdiction as to intervenor and said premises, and certainly, the lower court lost jurisdiction of intervenor and said premises 30 days after the entry of said order of May 11, 1936, and that on July 16, 1936, the court clearly had no jurisdiction of either of intervenor or said premises. 3. That the receiver upon the expiration of the period of redemption was a receiver de son tort. 4. That intervenor is not liable for any deficit created by the receiver." As to contention 2 it is sufficient to say that appellant is in no position to raise the point that the court had no jurisdiction of the person of appellant after the entry of the order of May 11. It was upon its motion that the court ordered the receiver to file its final account within ten days, "and that the hearing as to the unpaid operating expenses and for the deficiency incurred by the said Receiver and the liability of the parties for the said expenses and deficiency, be and the same is hereby set for hearing on June 1st, 1936, without further notice."

In the hearing before the trial court on July 15 appellant not only did not raise any question of jurisdiction but practically invited the court to proceed with the hearing. The contention that the court, in any event, lost jurisdiction of appellant thirty days after the order of May 11, 1936, is also without merit, as the record shows that the hearing was formally continued, without objection, from time to time.

Appellant contends that "where the receiver operated the property at a loss and failed to advise the court that he so operated the property, he is personally liable." It is a sufficient answer to this contention to state that no such point was made or suggested before the trial court at the time of the hearing. Indeed, appellant's counsel stated that the receiver had actually expended the money and that "it is just a question of your ruling on whether certain improvements are permanent or not such as window shades and curtain rods and carpeting and janitor's supplies." Not a single objection was made by the counsel during the proceeding, not even when the trial court announced its judgment. Counsel for appellant stood silent while the court stated his reasons why the claim of the receiver was a just one. It is a reasonable inference from the report of proceedings that counsel for appellant, at the time of the hearing, acquiesced in the ruling of the trial court. The contentions raised appear to be the result of an afterthought.

From a reading of the entire record we have reached the conclusion that all of the parties to the proceeding, including appellant, stood idly by, although they knew the receiver was operating the premises at a deficit. Appellant filed its bill on December 29, 1933, and undoubtedly had knowledge of the situation. The receiver was handling the property at a time when it was very difficult to manage

apartment buildings without a loss. The record shows that the Division State Bank, receiver, operated the premises at a loss, and that the instant receiver desired all parties in interest to know the real situation. No charge has been made that it was dishonest or inefficient in its management. Under the record none of the parties to the proceedings has an equitable right to complain of the order in question.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

39001

NEW ERA MOTORS, INC., a Corporation,
and A. M. ANDREWS,
(Complainants and Cross-Defendants) Appellants,

vs.

O. L. ASHTON, H. F. RUSSELL, doing business as Ashton & Russell, and LUCIEN I. YEOMANS, INC., a Corporation,
(Defendants and Cross-Complainants) Appellees,

and

FOREMAN STATE NATIONAL BANK, a Corporation,
(Cross Defendant) Appellee.

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APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

239 I.A. 623

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from a decree entered February 24, 1936, which dismissed their amended bill for want of equity and by way of relief to Ashton and Russell, defendants and cross-complainants, gave judgment in their favor against Andrews for $56,397.20 with interest from December 21, 1929, at the rate of 5% per annum.

The transactions out of which these controversies arise began May 11, 1929. The New Era Motors is a corporation organized under the laws of Delaware, with offices in New York and Philadelphia. It was on May 11, 1929, financing and promoting the manufacture and sale of a front wheel drive for automobiles, a novelty in automobile engineering, in which Andrews owned certain rights and licenses which he was under contract to assign to the motor company. Ashton and Russell were copartners doing business as manufacturing and contracting engineers in Chicago. Lucien I. Yeomans, Inc., was an Illinois corporation with offices in Chicago, where it was engaged in the profession of industrial engineering.

May 11, 1929, Andrews retained the Yeomans corporation as

his agent and supervisor in connection with work to be done and material to be furnished by Ashton & Russell under a written contract of the same date, by which they agreed to furnish 2000 sets of front wheel drives for automobiles, each set consisting of two assembled units substantially as shown on Weiss Engineering Corporation drawings 0-11, D-77 and 88, for $30.64 per unit, boxed f. o. b. Chicago. The agreement between Andrews and Ashton & Russell recited that the work was highly special in character; that there wasto be a tool expense of $8500; that 1/3 of the total amount of the order of $49,353.33 should be advanced, the balance to be paid by sight draft B/L attached as shipments were made.

May 18, 1929, Andrews furnished to Yeomans, Inc., and Ashton & Russell the drawings, specifications and data in connection with the manufacture of these front wheel drives, and Ashton & Russell proceeded to let sub-contracts for the manufacture of the various parts. The work was done under the supervision of Yeomans, Inc. As it progressed it was checked from time to time by the Weiss Engineering Company, Kolwitz, Muller, Reichman, Roberts and Harvey, all of whom were employees representing either Andrews or the New Era Motors Company.

These men gave instructions and from time to time ordered changes in plans and specifications. Mr. Yeomans and Mr. Harvey made several trips to the East to confer with plaintiff's engineer there, and upon returning ordered changes. The evidence shows that the front wheel drive unit was a novel idea in automobile engineering, and that much of the preliminary work was experimental. Changes were from time to time made in the plans and specifications, - to what extent is in dispute - but it seems that the final set of productive prints was not furnished to Ashton & Russell until September 29, 1929. They thereafter proceeded to manufacture on a

production basis and asked for shipping instructions and advancements of further sums of money as provided in the contract as they construed it. A few sets of drives were delivered, but Ashton & Russell were not able to obtain from Andrews orders for shipment or advancements of money as requested. It is apparent that plaintiff Andrews became financially embarrassed. Yeomans, Inc., acting for plaintiff, notified Ashton & Russell that unless they received orders to the contrary they should stop work December 16, 1929, and Yeomans, Inc., informed Andrews by telegram of this order without any practical results.

January 24, 1930, the New Era Motors, Inc., filed its bill in the Superior court, naming as defendants Ashton and Russell, copartners, and Lucien I. Yeomans, Inc. April 23, 1930, thereafter Andrews was by amendment made a co-plaintiff and an amended bill was filed. The amended bill set up verbatim the written agreements between Andrews and Ashton and Russell and Yeomans, Inc., of May 11, 1929. The bill averred that the agreement with Yeomans, Inc., provided that Yeomans would develop a source of supply for not exceeding 5000 sets of front wheel drives for automobiles substantially as shown on Weiss Engineering Corporation drawing O-11 and "detailed drawings furnished by us"; that the agreement with Ashton and Russell provided that the copartnership was to furnish 2000 sets of front wheel drives, "each set consisting of 2 assembled units substantially as shown upon Weiss Engineering Corporation drawings O-11, D-77 and 88"; that the price was to be 30.64 per unit, boxed f. o. b. Chicago; that Andrews acted for and in behalf of the Motor company; that May 18, 1929, he paid $1000 as retainer to Yeomans, Inc., and deposited on that date $5000 with the Chicago Trust Company to be applied on cost of manufacture under the contract, subject to the check of Ashton and Russell, to be countersigned by Lucien I. Yeomans or E. B. Hill; furnished all drawings and specifications

necessary to the manufacture of the drives; that Russell and Ashton proceeded to place orders for the manufacture of the drives, and that in September, 1929, they delivered 34 sets of the same and manufactured 170 sets which they had not delivered and which they refused to deliver; that the units were immediately needed in the manufacture of automobiles; that notwithstanding the $50,000 deposited under joint control with Russell and Ashton and Yeomans, defendants refused to deliver the goods, claiming additional sums of money to be due, and Yeomans, Inc., and Russell and Ashton had conspired to disburse illegitimately advancements made and to dissipate the funds; that Russell and Ashton are insolvent. The prayer of the amended bill was that a count might be taken, discovery made and defendants required to deliver unfurnished units and enjoined from disposing of the units to any persons other than the complainants.

Ashton and Russell and Yeomans, Inc., filed separate answers admitting the execution of the contracts on May 11th, the advancement of the moneys, etc., but denying the conspiracy and denying the equity of the bill as amended. Yeomans, Inc., in its answer also averred that Andrews was indebted to it in the sum of $4000 which had not been paid. Russell and Ashton in their answer claimed a balance due from complainants to them amounting to $99,865.35.

Thereafter Russell and Ashton filed a cross bill praying that Andrews be required to pay the amount claimed to be due to them. Yeomans, Inc., by amendment to its answer to the amended bill, set up that the issues as between it and complainants had been adjudicated in the State of New York in its favor, where on January 20, 1932, it obtained a judgment against Andrews for $5444.54, with costs amounting to $151.85. The complainants

answered each cross bill denying the material facts averred. The cause was put at issue and referred to a master who took the evidence and reported that the issues as between Andrews and defendant Yeomans, Inc., had been adjudicated by the judgment of the Supreme court of New York in favor of Yeomans, Inc.; that the equities were with the defendants and cross-complainants, and that there was a balance due to Russell and Ashton from Andrews amounting to $56,397.20, for which judgment should be entered, upon payment of which complainants would be entitled to their material and tools.

Objections by complainants were overruled by the master and the case was heard before the chancellor on exceptions to the master's report. As already stated, the chancellor, by decree entered February 24, 1936, overruled the exceptions, approved the report of the master, adjudged that the amended bill of complaint should be dismissed for want of equity, and decreed that Russell and Ashton recover from Andrews the sum of $56,397.20, with interest at 5% per annum from December 21, 1929, and costs.

Plaintiffs contend that the findings of the decree are against the manifest weight of the evidence; that the relationship of Yeomans, Inc., of agency for complainants was terminated through the conduct of Yeomans in conspiring with Russell and Ashton to dissipate the funds of Andrews deposited to the joint account; that the New York judgment obtained by Yeomans, Inc., against Andrews is not <u>res adjudicata</u> of the issues as between them.

We have been presented for examination with a record of almost 1500 typewritten pages, and more than 100 written exhibits, some of which are very technical. The complainants have filed an abstract of 261 printed pages. Cross-complainants deeming this insufficient have filed an additional abstract of 249 printed pages. The result is that we have been compelled in many instances to

examine portions of the record many times.

The controlling question in the case is presented by the contention of plaintiffs that the findings of the master are against the manifest weight of the evidence. We shall first, however, dispose of certain points of law urged by plaintiffs.

It is seriously argued that the suit in New York in which Lucien I. Yeomans, Inc., obtained a judgment against Andrews is not an adjudication of the issues as between them, and that the decree errs in so finding. Plaintiffs cite Chicago Theological Seminary v. People, 189 Ill. 439; and People ex rel. Lloyd, etc., v. University of Illinois, 357 Ill. 369, in each of which the court had under consideration the question of whether a claim of exemption for taxes had been determined and adjudicated by prior proceedings. The law stated in those cases is not at all applicable to facts such as are disclosed here. It appears from the record of the New York court, which is in evidence (and which has been only partially abstracted by plaintiffs), that Yeomans, Inc., sued Andrews in New York and filed a complaint in which it declared for services rendered by it to Andrews under the contract of May 11, 1929, which is the same contract here sued on; that Andrews answered admitting the execution of the agreement, expressly denying that Yeomans, Inc., complied with the terms and conditions of the contract, or that the sum demanded was due and payable. It also appears that Andrews there set up as part of his affirmative defense his own contract with Yeomans of May 11, 1929, and also the contract of Andrews with Russell and Ashton of the same date; averred the relationship of Yeomans, Inc., with reference thereto, and finally by the 14th paragraph of his answer averred upon information and belief the same conspiracy between Yeomans, Inc., and Russell and Ashton which is here averred in the amended bill. All this was set up in the New York suit by way of defense to the action for services rendered by

Yeomans, Inc. The issues, therefore, in the New York case between Yeomans, Inc., and Andrews were in part the precise issues which are here involved. The judgment in favor of Yeomans, Inc., shows that these issues were adjudicated against him in the New York case. Not only did that case determine the amount due from Andrews to Yeomans, Inc., but it also seems to determine conclusively that Ashton and Russell and Yeomans, Inc., did not conspire to defraud Andrews as alleged in the amended bill filed in the Superior court. Since Ashton and Russell could not conspire with themselves to defraud Andrews the determination of the issues involved in the New York suit seems to determine the same issues in the Illinois suit.

The complainants make the further contention that as a matter of law there was an implied warranty that the work required by the contract of May 11th should be proper and the goods delivered reasonably fitted for the intended use. Defendants cite a number of cases, such as General Fireproofing Co. v. Wallace & Son, 175 Fed. 650, 99 C.C.A. 204 (certiorari denied 217 U. S. 607), which it is claimed sustain this contention. The principle invoked seems to be analogous to that expressed in section 15 of the Sales act (Ill. State Bar Stats. 1935, chap. 121a, p. 2807), that where a buyer of goods expressly or by implication makes known to the seller the particular purpose for which the goods are required, and the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. The transactions here in question were not for the sale of goods, and a preponderance of the evidence clearly shows that the complainants did not rely on defendant's mechanical skill and judgment in so far as producing an article fit for intended use was concerned. It was understood that the work was to be let to subcontractors, and there is no contention here, as we understand the record, that these

were negligently chosen. In this respect this case is not unlike Miami Cycle Co. v. National Carbon Co., 268 Fed. 46, where it was contended that the manufacturer of automobile starters for motorcycles was liable upon an implied warranty, and the court said there was nothing in the record that would justify such a finding; that, "it was understood by both parties that this article had never been manufactured in forms suitable to this purpose; to modify the plaintiff's self starter used on automobiles and boats, and adapt it to successful use on motorcycles, involved questions of design and manufacture with which plaintiff was specially familiar, and questions of combining the starter with and attaching it to motorcycles and using it there, about which plaintiff knew nothing, and as to which defendant would be comparatively expert." Under analogous facts a similar conclusion was reached in Kellogg Bridge Company v. Hamilton, 110 U. S. 108; 28 L. Ed. 86; Thielman v. Penisch, 103 Ark. 307, 146 S. W. 525.

We now consider the controlling question, which seems to be whether the findings of the master, as approved by the chancellor, are, as plaintiffs contend, against the manifest preponderance of the evidence. In connection with that point, plaintiffs cite some authorities which state well settled rules. Such, for instance, as Oliver v. Ross, 239 Ill. 684, holding that where testimony is taken by a master and the chancellor has not heard the witnesses, the reviewing court is not bound by the rule that the findings of the chancellor will not be disturbed unless manifestly against the weight of the evidence. This is true; nevertheless the findings of a master who has seen and heard the witnesses are prima facie correct (Mallinger v. Shapiro, 329 Ill. 629), and are entitled to be given appropriate weight by the chancellor and by a court of review. Keuper v. Mette, 339 Ill. 586. Complainants also cite a large number of authorities to the effect that the court is not

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bound to believe the statement of a witness which is inherently improbable, or testimony which is contradictory, and that the testimony of witnesses may be so inherently improbable as to be unworthy of belief. All this is elementary law, and we have been guided thereby in our consideration of this record.

We regret that the exceptions do not present the controling point with greater clearness and conciseness. We have examined the exceptions, 29 in number. The decree in substance provides for two judgments. One is that the bill of complaint should be dismissed for want of equity. The other that Ashton and Russell recover judgment against Andrews for $56,397.80. The original bill against Russell and Ashton and Yeomans, Inc., was based upon the theory that the defendants conspired to defraud the complainants. The judgment rendered in New York finally adjudicated that issue against complainants.

There remains for consideration the question of whether the judgment in favor of Ashton and Russell should have been rendered or, if rendered, was for the correct amount. The evidence shows that the total amount was made up of very many items involving detail transactions, extending over many months. These different items are not specifically challenged. Indeed, an examination of the report of the master shows that such specific items as are criticized by complainants were disallowed by the master and are not included in the judgment rendered. The finding of the master is prima facie correct. He saw and heard the witnesses. The statement of an account is particularly within the province of the work of the master. It is for the party opposing to point out specifically and clearly alleged errors. The argument of complainants challenges the whole account on the theory that Ashton and Russell were guilty of fraud. In the bill it was

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charged that in this they conspired with Yeomans, Inc., representing Andrews. The courts of New York have adjudicated that issue contrary to the contention of plaintiffs in so far as Yeomans, Inc., is concerned. It is for the complainants who set up this defense to point out evidence in the record sufficient to establish it and overcome the findings of the master. Complainants have not done this. Without going in detail over the record we may summarize by saying that our conclusion is compelled, first by the fact that the findings of the master are prima facie correct. Second, that an inference that the same are correct arises by reason of the failure of complainants to present a fair and impartial abstract of the evidence on this point. Third, by a careful audit of the books of account of Russell and Ashton covering these transactions which was made by the auditor of complainants under the direction of their own attorney, which indicates that the amount for which judgment was entered was justly due. Fourth, the clear and convincing testimony of Yeomans, who was acting as the representative of Andrews, and fifth, and finally, by the practical failure of the reply brief to give any sufficient answer to the arguments of cross-complainants' brief, which contains a full and adequate recital and discussion of the facts bearing on this issue. We hold complainants have failed to point out evidence sufficient to overcome the findings of the master. For these reasons the decree is affirmed.

AFFIRMED.

O'Connor and McGurely, JJ., concur.

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39072

60

HUMPHREY TRIMBLE, (Plaintiff) Appellant,

vs.

HARRY MANASTER AND BROTHER, INC., a Corporation, (Defendant), Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 623

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by leave given the plaintiff from a judgment entered in favor of the defendant in an action for damages for false arrest and malicious prosecution. The declaration filed April 5, 1935, in two counts, charged in substance that the defendant, intending to injure plaintiff, on July 14, 1934, appeared before Judge Howard Hayes of the Municipal court of Chicago, and falsely, maliciously and without any reasonable or probable cause, charged plaintiff with having feloniously stolen smoked and canned meats to the value of $35.00, the personal property and goods of Harry Manaster and Brother, Inc.; that without any cause, knowing the charge to be false and malicious, defendant procured the judge to issue a warrant to bring plaintiff before him for the supposed offense, and that thereby caused and procured the plaintiff to be arrested and imprisoned on the same day and the day following until plaintiff gave bond for his appearance on July 16, 1934; that on July 27, 1934, the accusation was heard by Judge Erickson of the Municipal court, when it was determined that plaintiff was not guilty of the supposed offense. The cause was dismissed and plaintiff discharged out of custody, fully acquitted, etc. Defendant answered that it caused the complaint to be filed against plaintiff after he had been accused by other employees of being an accomplice in the taking of the property of defendant, and relying upon statements and accusations so made which were believed to be true; de-

nied that it had acted maliciously and without reasonable or probable cause in procuring the warrant for plaintiff as alleged, and denied that the cause was dismissed and plaintiff discharged and acquitted as alleged in the complaint, or that plaintiff had sustained damages as alleged. Plaintiff gave evidence tending to support the allegations of the declaration. The sole questions for determination upon the trial of the cause were issues of fact as to whether defendant caused the arrest of plaintiff maliciously and without probable cause. The question in the trial court was whether the material averments of the declaration were established by a preponderance of the evidence. The question for determination in this court is whether the finding of the trial court is clearly and manifestly against the weight of the evidence.

The evidence shows that plaintiff, prior to his arrest, was a man of good reputation; that for a period of one year prior to July 14, 1934, he was employed by defendant at its plant located near 37th street, Chicago, as a night watchman. Defendant was engaged in the manufacture of meat products. Plaintiff was accustomed to begin his work at twelve o'clock at night and continue until six in the morning. His duties consisted in part of pulling 14 boxes located at various places inside and outside of the building in which defendant's business was transacted. At the time he began to work for defendant he was instructed in the nature of his duties by another watchman, who informed him that there had been much stealing from the plant. Defendant's superintendent, Walter L. Kincaid, also informed him that wood, barrels and meats had been stolen from the plant right in the middle of the day, and that plaintiff should be alert and watch. About four days before the arrest of plaintiff Kincaid, superintendent of defendant's packing house, missed several articles of property, and about the same time visited a saloon conducted by one Steve Brazinski at

37th place and Morgan street, near defendant's plant; while there he saw some of defendant's property in the ice box in the saloon; he spoke to the bartender about it and was told by him that the property had been brought over to the saloon from the Harry Manaster plant by the night smokeman, Bucna, and the night scrubman, Schodrof, and exchanged for whiskey and beer. The following morning the bartender visited the plant of defendant and was interviewed by Mr. Harry Manaster, first vice-president of defendant company, in the presence of the superintendent, where he repeated his story that Bucna and Schodrof had brought defendant's goods to the saloon. Superintendent Kincaid then got in touch with Captain Hughes of the police station, who advised him to swear out a search warrant to search the premises on which the saloon was located, and this was done July 14, 1934. The saloon was raided and sundry goods of the defendant found and removed. On the same day Bucna, the night smokeman, and Schodrof, the cook, and Mr. Walters, the scrubman, employees of defendant, were arrested by the police department of Chicago. On the same evening when plaintiff Trimble arrived to go to work he also was arrested and taken to the police station by a police officer, placed in a cell and detained there until the early morning of July 16, 1934. At a later hour on the same morning plaintiff appeared in the criminal branch of the Municipal court with the other defendants; his case was continued to a later date and then sent to the Felony court where on July 27th Bucna, Schodrof and Walters pleaded guilty, and the State's Attorney entered a nolle as to the charge against plaintiff Trimble. Prior to the arrest of plaintiff, Bucna made a statement to the police, which was reduced to writing and signed by him, although it is undisputed that he could not read or write the English language. The evidence shows, however, that it was read to him before he signed it, and in

his statement he implicated the plaintiff in the stealing of the goods. Plaintiff denied the accusation in the presence of Bunca and the police officers, and denied it with an oath.

Mr. Harry Manaster visited the police station on Sunday morning, July 15th, after the arrest; he was informed by the police of the statements made by Bucna and others tending to implicate the plaintiff, and on the following day Mr. Manaster signed the complaint for a warrant against plaintiff and upon the advice of the police and upon information given him by them as to the accusation made by Bucna and other employees to the effect that plaintiff had suggested they should take the goods and exchange them for drinks, and had joined with them in drinking the liquor so obtained. Prior to this time, the testimony shows, defendant did not suspect plaintiff of stealing. There was no ill feeling between them of any kind. The evidence shows without question that Manaster, the vice-president, caused the arrest of plaintiff; that upon the trial of the cause the plaintiff was discharged; that he was not in fact guilty of the offense, and the sole question for determination upon this record seems to be whether, under the evidence as summarized, it can be said that Manaster, in swearing out the warrant, acted without probable cause. In Harpham v. Whitney, 77 Ill. 32, the Supreme court of Illinois said:

"Probable cause is defined as such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion that the person arrested is guilty. Bacon v. Towne et al., 4 Cush. 217. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. James v. Phelps, 11 Ad. & El. 483, 489; Foshay v. Ferguson, supra.

A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offense, is sufficient to show probable cause. Jacks v. Stimpson, 1[illegible] Ill. 70[illegible]."

The rule stated in this case has been consistently followed in a long line of cases by the Supreme and Appellate courts of this

State. Glenn v. Lawrence et al, 280 Ill. 581; Ellsworth v. Peoples Life Ins. Company, 247 Ill. App. 161; Farris v. Messimore, 219 Ill. App. 582; Lakarewicz v. National Lead Co., 264 Ill. App. 16; Berner v. Prairie State Bank, 281 Ill. App. 31. The cases also hold that the burden of proof in a case of this kind is upon the plaintiff. Krebs v. Thomas, 12 Ill. App. 266; Levinson v. Thomas, 174 Ill. App. 68. The fact of the discharge or acquittal of plaintiff does not show or tend to show want of probable cause or the presence of malice. McBean v. Ritchie, 13 Ill. 114; Hurd v. Shaw, 20 Ill. 354; Tuebbecke v. A. L. Rothschild & Co., 152 Ill. App. 321; Mioduszewski v. Spoganitz, 209 Ill. App. 112. To justify a finding of malice it must be shown that plaintiff was actuated by improper motives. Giroux v. Goldman, 208 Ill. App. 261; Farris v. Messimore, 219 Ill. App. 582; Glenn v. Lawrence et al., 280 Ill. 581.

The question for the trial court was whether defendant acted with malice and without probable cause, and the burden of proof, as already stated, was on the plaintiff to establish that controlling fact. In this court the question for determination is whether the finding of the trial court, who saw and heard the witnesses, is against the clear preponderance of the evidence. In determining that question, the finding of the court is entitled to the same weight as the verdict of a jury. It is impossible on this record to so hold. In the first place, there is no doubt the crime of larceny was in fact committed and had repeatedly been committed while plaintiff was acting as defendant's watchman. Plaintiff was accused by the statements of his co-employees. While it is true that the testimony of an accomplice is always acted upon with great caution, (People v. Spira, 264 Ill. 243; People v. Cotell, 298 Ill. 207; People v. Sapp, 282 Ill. 51) we think, under all the circumstances, it cannot be said that defendant acted without probable

cause in believing plaintiff to be guilty, although the evidence given upon the trial indicated that he was in fact not guilty.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39232

CHICAGO CITY BANK AND TRUST COMPANY,
as Conservator of the Estate of
Catherine L. Bromstedt, an insane
person,
Plaintiff,

vs.

MARTHA PASCHONG, ARTHUR W. BROMSTEDT,
ETHEL R. MARTIN, WILLIAM F. BROMSTEDT
and EARL BROMSTEDT,
Defendants and Appellees,

and

MARY BROMSTEDT, FRANK MARTIN, MABEL
BROMSTEDT, ETHEL BROMSTEDT, GEORGE LENZ,
CHRISTOPH H. DEHNING, PETER W. MAYN,
GOLDBLATT BROS., INC., HOEFELD, INC.,
ALBERT HOEFELD, ACE DRUG STORES, INC.,
JOSEPH L. GILL, County Treasurer, and
CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY,
Defendants,

and

SIXTY-THIRD AND HALSTED REALTY COMPANY,
a Corporation,
Defendant and Appellant.

On Appeal of SIXTY-THIRD AND HALSTED REALTY
COMPANY, a Corporation,
Appellant.

61

289 I.A. 623

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Realty company from an order entered by the Circuit court of Cook county July 17, 1936, upon the petition of certain intervenors, appointing a receiver for premises in the City of Chicago, and directing that rents which had accumulated under an escrow agreement should be distributed to the petitioners. That part of the order appointing a receiver being of an interlocutory nature was considered by this court on a former appeal - 287 Ill. App. 1. The facts are fully stated in that opinion. The order was reversed for the reason, as stated in the opinion, that the Circuit court was without jurisdiction

[illegible]

because the Superior court of Cook county had obtained jurisdiction of the res in a prior proceeding. We there said:

"Clearly, in order to permit the superior court to make effective any judgment or decree which might be entered in that cause, its dominion and jurisdiction over the moneys in question should not be disturbed. Assuming that the superior court should enter a decree as prayed for by the realty company and it should be found that the receiver in the circuit court had possession of the money or had already distributed it, the decree of the superior court would have nothing upon which to operate and would be merely an empty gesture.

The pleadings before the circuit court chancellor apprised him of all these facts. The petitioners should have been sent to the superior court to make application for a receiver.

The appointment of the receiver herein was an attempt to oust the superior court of the jurisdiction over a subject matter which it had obtained long prior to the filing of the petition herein."

The reasons there stated are also applicable to that part of the order of July 17th which we are called upon to review in this proceeding. Manifestly, if the court was without jurisdiction to appoint a receiver temporarily for the funds, it was also without jurisdiction to make a final distribution of the same funds. That decision states the law of the case, by which we are now bound on this appeal. Gridley v. Wood, 22[illegible] Ill. App. 46; Wolkau v. Wolkau, 217 Ill. App. 471. It follows that this order also must be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

39252

62

NATIONAL BUILDERS BANK OF CHICAGO,
a Corporation,
Plaintiff-Appellee,

vs.

OTTO FRERK and ELMERA FRERK et al.,
Defendants-Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

289 I.A. 624

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

July 3, 1935, plaintiff filed its bill to foreclose a trust deed executed by defendants, Otto Frerk and Elmera Frerk, his wife, on June 11, 1932, whereby to secure their principal note for $25,000, due five years after date, with interest payable semi-annually, they conveyed and warranted to the plaintiff, as trustee, an undivided one-half interest in certain premises described, situated in Chicago, Cook county, Illinois. The bill contained the usual averments as to execution, delivery, default, etc., and prayed for an accounting, a decree of sale and foreclosure. The bill was duly verified.

Defendants filed an amended answer and counterclaim, which were also verified. Plaintiff moved to strike the answer and counterclaim. The court sustained the motion. Defendants elected to stand by their pleading and were defaulted for want of an answer. The cause was referred to a master who took the evidence and reported finding the equities with plaintiff, overruled objections, and the chancellor entered a decree of foreclosure in conformity with the report of the master. To reverse this decree defendants appeal. The sole question for determination on the record is whether the court erred in striking the amended answer and counterclaim.

Defendants, by their answer, which they also call a counterclaim, sought to interpose the defense that the trust deed was void as being executed and delivered contrary to the provisions of an

act concerning future interests, approved July 2, 1921. (See Illinois Session Laws, 1921, p. 470; Ill. State Bar Stats. 1935, paragraph 24, p. 3131.) This statute provides in substance that no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect.

Defendants, by their amended answer, admitted all the allegations of the bill of complaint except that, relying upon the statute above described, they denied that at the time of the execution of the trust deed on June 11, 1932, they owned an undivided one-half interest in the real estate conveyed by their deed. They averred they were not the owners in fee simple but merely "vested or contingent remaindermen," their interest being subject to a life estate in Albertine Frerk, mother of Otto Frerk. The answer set up that defendant took title under the sixth clause of the last will and testament of Henry Frerk, father of Otto and Alfred Frerk; that Alfred Frerk died after the death of the father; that Albertine Frerk, the mother, was still living; that this will was dated April 21, 1910, and admitted to probate by the Probate court of Cook county May 25, 1910. The sixth paragraph of the will, under which defendants took title, was as follows:

"Sixth: I give, devise and bequeath unto my said wife, for and during her natural life, that is to say, a life estate in the premises known as the Yards, *** and I give, devise and bequeath all of my said last mentioned property, known as the two Yards *** upon the death of my said wife, to my two sons, ALFRED FRERK and OTTO FRERK, in equal shares, to have and to hold thesame and to their heirs and assigns forever, the child or children of said sons, upon their decease, to take the share the son would have taken if living."

The amended answer averred that the interest of defendants under this clause of the will was either vested or contingent. Manifestly it could not be both. It was either one or the other, and the law of this State favors the vesting of estates. We are quite at a loss to understand upon what theory defendant contends

that the statute relied upon is applicable to the interest which he took under the sixth clause of the will. In Lachenmeyer v. Gehlbach, 266 Ill. 11, the Supreme court of this State construed a will which contained a provision substantially similar, and said:

"**** Interpreting the will in the light of established rules and having in mind the favor with which the law regards vested estates, we conclude that the testator meant to give his widow an estate for life and a vested remainder in fee to his children. The remainder to the children is, however, subject to the shifting executory devises in the event that any of them die before the life tenant's death, either leaving children who would take or without children, when the share would go to the surviving children. The gifts over if the children die, with or without children, are executory devises, which are not destructible. The fee of the children, whether vested in interest, only, or vested in possession, in case the life estate should terminate prematurely before the life tenant's death, is subject to the executory devises over, and any conveyance by them would carry with it the limitations which will become effective upon the happening of the events specified in the will."

A similar rule was applied in Warrington v. Chester, 294 Ill. 524, and Boye v. Boye, 300 Ill. 508.

We hold that the interest of defendant was vested and that the statute invoked was not applicable. But even if the estate devised were held to be a future interest, we think the mortgage was not void under this statute. The law is that remainders can be sold, encumbered and conveyed; (Curtiss v. Root, 9[illegible] Ill. 518); that all kinds of vested, contingent, and future interests may be mortgaged. Jones on Mortgages, (8th ed.), sec. 191, page 226. Reeves Illinois Law of Mortgages and Foreclosures, vol. 1, sec. 90, page 117. Manifestly, the mortgage would not have the effect of destroying the remainder even if it were held to be contingent. Moreover, upon the plainest principles, the defendant, having by his deed warranted and conveyed an estate in fee, is now estopped to assert the contrary in these proceedings. The cases holding so are so numerous as to make it unnecessary to discuss them in detail. Dobbins v. Cruger, 108 Ill. 1[illegible]8; Roderick v. [illegible]eckin, 204 Ill. 625; Bittner v. Field, 354 Ill. 316; Terre Haute Trust Co. v. Wells Ship

Co., 316 Ill. App. 608; Chicago Title and Trust Co. v. Wallace, 250 Ill. App. 295.

We hold the court did not err in striking the amended answer and the counterclaim. The decree is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39264

63

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,

vs.

ELIZABETH MARTIN et al.,
Defendants.

GEORGE S. MARTIN,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 624

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

July 16, 1936, plaintiff bank, as successor trustee, filed its bill to foreclose a trust deed executed October 29, 1926, to secure a principal indebtedness of $35,000, represented by a note of defendants executed and delivered on the same date. The trust deed conveyed several parcels of land which were improved with a two-story brick house containing sixteen rooms and a basement. The building is used as a night club. The bill was duly verified, contained the usual averments and alleged that the premises were scant and meager security for the indebtedness in that the indebtedness was then, with accrued interest, etc., in excess of $43,000, while the value of the premises was less than $40,000.

August 12, 1936, defendant George S. Martin, one of the owners of the premises and one of the makers of the principal note and trust deed, filed a petition in which he averred he was an owner and managed the property in behalf of all the owners; that on May 31, 1936, the premises were rendered untenantable by fire; that he engaged an adjuster to adjust the loss; that on July 8, 1936, having been informed that the insurance companies had made an offer of $3400 in settlement of the fire loss and might pay as high as $3800, he entered into a contract with J. E. Barry & Co. to repair the premises according to an itemized list of repairs agreed upon by the adjuster; that Barry & Co. proceeded from July 8th to July 13,

1936, to make such repairs; that on July 10th, at a conference in which Mr. Pollack represented the plaintiff, he informed Mr. Pollack of the offer of settlement, and Pollack said he saw no reason why the bank would not continue with the loan on the same basis provided arrearages were paid in full; that at the suggestion of the plaintiff bank the petitioner instructed Barry & Co. to hold up the work on the building temporarily; that thereafter petitioner settled the fire loss for the sum of $3582.84; that on July 22, 1936, petitioner made a written proposition to the plaintiff bank stating that arrearages on the loan would be paid in full if the bank would continue the loan in force and also agree that the money received from the fire loss should be applied on the contract with Barry & Co. for the repair of the premises. The plaintiff bank declined the proposition and notified Barry & Co. not to carry out the contract with petitioner. The petition avers the contract is fair and reasonable, was entered into before the plaintiff filed its bill to foreclose; that the repairs are necessary in order that an income may be realized from the premises. Petitioner had a tenant ready, willing and able to enter into a lease of the premises as soon as the rehabilitation was made; that as the contract with Barry & Co. was not carried out, petitioner and other owners would be held liable on their contract. The prayer of the petition was for an order directing Barry & Co. to proceed with the repairs and ordering the insurance companies to pay the fire loss moneys to J. E. Barry & Co. This petition was duly verified.

August 13, 1936, plaintiff filed its motion to strike the petition because the court was without jurisdiction of the subject matter, namely, the contract between Barry & Co. and George S. Martin; that the court did not have jurisdiction of Barry & Co., nor jurisdiction of the insurance companies. The motion of the plain-

tiff to strike the petition was denied and leave granted the petitioner to amend his petition by striking out the last paragraph, which contained the prayer, and in lieu thereof inserting a prayer "that an order be entered directing the plaintiff and such defendants as said fire loss may be payable to, to permit J. R. Barry & Co. to complete said contract and to apply the proceeds of said fire loss toward the payment of said contract." An order was thereupon, on September 2nd, entered by the court substantially as prayed in the amended petition. September 4, 1936, plaintiff moved the court for an order vacating the order of September 2nd, and that plaintiff might have a reasonable time to answer defendant's petition. This motion was denied, and plaintiff gave notice of and perfected this appeal from the order entered September 2, 1936. The petitioner has not appeared in this court to support the order entered.

The trust deed provided in substance that as additional security for the payment of the indebtedness the mortgagors should keep the buildings and fixtures insured against loss or damage by fire for the full insurable value thereof, in insurance companies to be approved by the trustee, and to make all sums recoverable upon the policies payable to the trustee for the benefit of the holder or holders of the principal note, by the usual mortgagee or trustee clause to be attached to such policies, and to deliver all such policies to the party of the second part; and that in case of failure of the mortgagors to so insure, the party of the second part might procure such insurance, the cost of which should become additional indebtedness secured by the trust deed, etc.

The plaintiff contends, citing Wilson v. Hakes, 36 Ill. App. 539; Grange Hill Company v. Western Assurance Co., 112 Ill. 396, and similar cases, that this was a matter of contract between the parties and that the courts were without authority to alter or

vary the terms of the contracts, but could only interpret or apply them. The Farber-Washington Company v. The City of Chicago, 267 Ill. 136; The Hibernian Banking Association v. Davis, 295 Ill. 537. This contention must be sustained. The amended petition did not set up grounds for relief in equity. It was error to enter the order of September 2nd, and it will be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

39298

64

GUISEPPE TITO, Executor of the Last Will and Testament of the Estate of MARIA NICOLA TITO, Deceased,
Appellant,

vs.

SOCIETA AGRICOLA OPERAIA S. CRISTOFORO E. MARIA VERGINE INCORONATA DI RICIGLIANO, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

269 I.A. 624

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit, originally begun by plaintiff as executor of the last will and testament of his deceased wife, Maria Nicola Tito, was thereafter by leave continued by plaintiff in his individual capacity. Defendant is a fraternal insurance society organized under the law of Illinois, of which Maria Nicola Tito was a member in good standing at the time of her death. The suit was brought for a balance alleged to be due under the by-laws of the society as a Mortuary Benefit. Under Articles 28 and 29 of the by-laws of the defendant society as the same formerly existed, it was provided that the society would upon the death of a member pay $500 to the family for funeral expenses. The constitution and by-laws provided that this money should be raised by a mortuary per capita tax upon members of the society which should be fixed by the assembly of the society at the first meeting in December for the following year; that the quota might vary annually according to the number of members, due to the fact that the family of the deceased should receive $500. Mrs. Tito died December 9, 1932. She had been a member of defendant society since its organization and always paid her dues. December 4, 1932, just five days prior to her death, the by-laws and constitution of the society were changed so as to provide that on and after that date monthly dues of members should be 80¢ each and mortuary dues $1.00 a member; $5 a week

should be paid during illness not to exceed 13 weeks in all, the first and the last three and the excess days over even weeks not to be included. The mortuary benefit should be $1 a member for the number of members "current." Defendant society paid the amount due under the by-laws as amended, namely, $250, but resists payment of the balance upon the ground that Maria Nicola Tito was present at the meeting where the amendments to the by-laws and constitution were made, and had knowledge thereof, consented to and acquiesced in the same. November 27, 1933, defendant society issued its check to the order of plaintiff as heir of the deceased for $250. The check is in evidence and bears on the back an endorsement as follows: "Full and complete release of all claims a/c Death Benefit accruing to Estate of Maria Nicola Tito, - Deceased." This release is signed, "Jos. Tito---heir of Maria Nicola Tito Deceased."

Plaintiff testified that this endorsement was on the back of the check when he affixed his signature thereto, which he admitted to be genuine. He says that when the committee from the defendant society offered the check to him he said he would not take a check except for the full amount of $500, but was told to take the check, and that if Frank Taglia, whose case was then pending in the Appellate court, got the balance he was suing for, plaintiff also would be paid the balance, notwithstanding his acceptance of the check. Mr. Catena, whose endorsement appears on the check following that of plaintiff and who delivered the check to plaintiff, testified, denying this conversation and says that he spoke to plaintiff at the wake and told him that the society had reduced the amount to be paid, and that the reduction had taken effect on December 4th; that plaintiff replied that he knew this; that his mother was at the meeting when the change was made, came home and told him the rate had been reduced to $1 a member,

and that she was glad of it. He says that plaintiff hesitated when the check was first tendered but afterward told him he had decided to take it, and that they then went to the Bank Napoli where the transaction was completed. His testimony was corroborated by several witnesses, and testimony was also given to the effect that the deceased was present at the meeting when the by-laws were amended and declared herself in favor of the change.

The court heard all this evidence and disregarding, as we must presume, all incompetent evidence, made a finding for defendant and entered judgment thereon.

Upon two former appeals the question of the liability of defendant society to persons who became members prior to December 4, 1932, in view of the change of the by-laws on that date reducing the amount to be paid, has received consideration from this court. In Taglia, Admr. v. Societa, etc., 279 Ill. App. 536, the plaintiff in the trial court recovered a judgment for the balance of $500 found to be due as a mortuary benefit under the original articles of the by-laws. The opinion followed the rule laid down in Covenant Mutual Life Assn. v. Kentner, 188 Ill. 431, to the effect -

"If a member agrees that future by-laws or amendments shall enter into and form a part of his contract and modify or vary it, he will be bound by such by-laws or amendments because they are a part of his contract. *** Unless there is an express agreement that a member shall be bound by future by-laws varying or modifying his contract, he is not so bound."

The court in the Taglia case said:

"Amended article 29 of the by-laws might well be effective as to future members of the society, as well as to all those who were members at the time of its enactment who assented to it, but we are constrained to hold that it could not vary or modify plaintiff's rights under the contract of the insured with the society."

In Peter Quaracino, Admr. v. Societa Agricola, etc., 286 Ill. App._____; 3 N. E. (2d) 352, the question of the rights of former members was again considered, and a judgment for the full amount of $500 affirmed upon the theory that the member did not

give her consent to the change in the by-laws reducing the amount of the mortuary benefit. We there said:

"In the instant case we hold that since the member, Mrs. Quaracino, did not consent to the change in the by-laws whereby the mortuary benefit of $500 was reduced to $1 per member, such change was ineffective as to her or her family."

We there cited in support of this Jones v. Moaleen Mutual Benefit Assoc., 337 Ill. 431, and York v. Central Ill. Relief Assoc., 340 Ill. 595.

The Taglia and Quaracino cases are clearly distinguishable from the instant case in that in each of them the trial court found as a matter of fact that the deceased member did not consent to the change in the by-laws. In this case the finding of the court is that the deceased member consented to and voted for the change. The endorsement on the check establishes by a clear preponderance of the evidence that the rights of the parties were after consideration settled, and the acceptance of the check amounted to a release of any claim for further benefits. The issues of fact being settled by the finding of the court in favor of the defendant, the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39246

65

HAROLD EPSTEIN et al., Appellees,	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
vs.	)	
ALVIN C. DUNAS et al., Defendants.	)	
On Appeal of FANNIE PINSLER, Defendant and Petitioner.	)	289 I.A. 625

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Fannie Pinsler, defendant, appeals from an order which overruled her objections to the final account and report of Milton H. Morris as receiver in foreclosure proceedings, and also from the order which denied her petition that Epstein, the complainant, Morris, the receiver, Jesse Sissman, the receiver's attorney, and Peter Sissman be directed to pay her certain sums of money aggregating apparently approximately $3700.

The basis of defendant's claim seems to be that Morris was improperly appointed receiver of premises of which she was a half owner, without notice to her; that the proceeding in which he was appointed was subsequently dismissed for want of prosecution, hence she is entitled to one-half of the money collected by the receiver.

October 8, 1929, complainant Epstein filed his bill to foreclose a second mortgage; defendant Fannie Pinsler was made a party defendant with others but she was not served with summons or by publication.

October 14th Milton H. Morris was appointed receiver of the premises, upon notice served upon the former owner, Dunas, who had executed the second mortgage papers. Subsequently, in September, 1930, it was ordered that the receiver pay himself $350 and Jesse Sissman, his attorney, $250.

June 19, 1931, the West Side Trust and Savings Bank filed its bill to foreclose the first mortgage on the premises, and on June 29th the court in the Epstein foreclosure ordered that the receivership of Morris be extended to the Bank foreclosure case, and the receiver was ordered to continue in possession and collect the rents, which he did. Thereafter he filed his current reports and accounts and his final report in the Bank case.

July 29, 1932, upon demand of the trustee in the Bank case and a petition presented and upon direction of the court, the receiver surrendered possession of the premises to the trustee. The defendant did not come into possession of the premises at this time but possession was in the trustee under its prior right.

August 10, 1934, an order was entered dismissing the Epstein foreclosure case for want of prosecution. Counsel for the appellees say that this order was entered by misprision of the clerk and present facts and orders of the court tending to support this contention.

April, 1936, defendant Pinsler filed her petition in the Epstein case; answers were filed and the court entered an order to the effect that the receiver had filed his final account, which was approved, in the Bank foreclosure case, but that no reports had been filed by him in the Epstein case; the receiver was thereupon ordered to file his account and his report in the Epstein case within five days; the receiver filed such a report, from which it appeared that he had filed his reports and accounts in the Bank case, which were approved, and on July 28, 1932, filed in the Bank case his final report, which was there approved.

Defendant filed objections to this report, but on June 8, 1936, the report in the Epstein case was approved. The court found that there was a balance on hand of $826.27 in the hands of the receiver, which he was ordered to deposit with the clerk of the court; the court also found that the Epstein case had been dismissed but

that the court had jurisdiction to dispose of all matters pertaining to the order of distribution of the $326.27 on deposit with the clerk of the court; defendant's objections were overruled and the final report of the receiver was approved and he was discharged. This is one of the two orders appealed from.

May 23, 1936, defendant filed a second petition in which she alleged that jurisdiction had never been obtained over her until she entered her appearance in April, 1936; alleged that Epstein was not the owner of the second mortgage note and trust deed and that the actual owner was Peter Sissman, an attorney; that prior to the date the receivership had been extended to the Bank case the receiver had paid himself and Jesse Sissman, his attorney, pursuant to orders, $1100, of which $450 was paid to the attorney, and the petitioner asked that this $450 be repaid to her. The petition is quite lengthy, setting forth in detail many orders of the court but alleging, in substance, that by the dismissal of the Epstein case the receivership was vacated and all orders directing the receiver to make payments were vacated and were void, and she asked that the appellees be ordered to repay her the amount of such payments. All parties were ruled to answer this petition and after hearing the court again entered an order finding that the report filed by the receiver in the Epstein case was correct and that none of the objections were well founded; that a final account had theretofore been filed in the Bank case, which was approved, and that this allowed certain sums to Morris and to Jesse Sissman.

July 29, 1936, an order was entered reciting that due notice had been given to all the parties; that the court had jurisdiction to adjudicate the rights of the defendant Finsler and to direct the disposition of the funds deposited with the clerk by the receiver; finds that part of said sum, amounting to $235.85, represents the net rents collected by the receiver prior to the extension of the

receivership to the Bank case; finds that this belongs to the owner of the real estate and ordered the clerk to pay the defendant Pinsler one-half of that amount. Defendant has appealed from the orders of June 8 and July 29, 1936.

Appellees have filed in this case a plea of release of errors with their motion to dismiss the appeal. We have denied this motion, although it was made to appear that on July 29, 1936, a payment of $117.92 was made to defendant Pinsler, as directed by the court in the order of July 29th from which defendant has appealed.

Defendant rests her case upon the proposition that where a receiver is appointed and the complainant's bill subsequently dismissed, this is an adjudication that the receiver was improperly appointed and hence the owner is entitled to all fees which he or his solicitor have received. Cases like Burrows v. Merrifield, 243 Ill. 363, and Friedman v. Illinois State Farmers Assoc., 279 Ill. App. 476, support this as a general rule. But these cases are not applicable to the present situation. Here, when the Bank foreclosure proceeding was commenced and the receivership in the Epstein case extended to it, this had the effect of ratifying the appointment in the Epstein case. The complainant in the Epstein case could assert his rights under the second mortgage by a cross bill in the Bank foreclosure proceeding, so that there was no purpose to be served in continuing with the Epstein case as a separate proceeding. Under the circumstances its dismissal had no bearing whatever upon the propriety of the appointment of a receiver.

Counsel for both parties have not argued the points in their brief but have indulged in a general discussion. Rule 7 of our court provides that the argument shall be confined to the points made in the brief and no others, and a point made but not argued may be considered waived.

We see no convincing reason to reverse the orders appealed from and they are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39267

JULES GILMER KORNER, Jr., Appellant,

vs.

MAURICE T. WEINSTEIN, Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

291 I.A. 625

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

January 16, 1936, a judgment was entered, apparently by default, against defendant for $7267.57; May 13, 1936, which was after the term at which judgment was entered, defendant filed a petition asking that the judgment be vacated and set aside; June 26, 1936, the court vacated the judgment and plaintiff appeals from this order.

The controversy is between attorneys. The suit was commenced May 10, 1932; the declaration alleged that plaintiff had performed services as attorney for the defendant and had not been paid for such services. Defendant filed an appearance and a plea, supported by an affidavit, and a demand for a jury trial; in his plea defendant alleged that plaintiff had acted as associate counsel for defendant and that the defendant had paid him in full for such services.

The record next shows thetjudgment of January 16, 1936, against defendant entered by William J. Wimbiscus, Judge. May 13th defendant filed the petition asking that the judgment be vacated; notice of the motion was duly served upon the attorneys for plaintiff.

The petition asserted that the cause had been assigned for trial to Judge Daniel P. Trude; that no notice of trial was ever served, as required by the rules of the court; that in December, 1935, petitioner consulted the docket and no notation appeared

relating to the calling of the case; that he asked one of his associates to watch this case during January, 1936, in which month petitioner was ill, but that the associate overlooked the call of the case which appeared in the Chicago Daily Law Bulletin; that he did not learn of the judgment until May; the petition also restated the defense set forth in his plea.

June 26th the court entered an order finding that no notice of trial had ever been served upon defendant as required by the rules of the court; that the case had appeared on the docket of cases assigned to Judge Daniel P. Trude for all the years between 1932 and 1936, and that the cause was never called for trial; that it appeared that defendant was ill and unable to watch his call during January, 1936, at which time this case, with many hundred other cases was taken from the trial calendars by an executive committee of the court and assigned to a "Special Calendar to be heard by this Court;" the court thereupon ordered that the default judgment of January 16, 1936, be vacated and set aside and the cause set down for hearing. The defendant had on file a demand for a jury trial. The record of the judgment of January 16th recites that the cause was tried by the court without a jury. In People v. Delnero, 260 Ill. App. 624, we held that the court was without authority to hear the cause without a jury where the defendant had demanded a jury trial. We cited section 5, article 2 of the constitution of 1870 - "The right of trial by jury as heretofore enjoyed, shall remain inviolate....." 24 Cyc., page 159, says: "Where, however, a party has demanded a jury trial the mere fact that he is absent when his case is reached and called for trial is not a waiver or forfeiture of his right...." Under these circumstances the court was not authorized to try the cause without a jury, and the absence of the defendant was not a waiver of this right in this respect.

Plaintiff's sole argument is that courts have no power to set aside judgments after the expiration of the term at which they are rendered. Section 72 of the Civil Practice Act authorizes a court, upon a proper showing, to vacate a judgment after the term at which it was entered. Under the statute defendant had the right to file his petition or motion seeking to have the judgment vacated.

As has been said in many cases, such a motion or petition stands as a declaration in a new suit. If the plaintiff desired to question the sufficiency of the petition he should have done so by filing a "demurrer, plea of nulla est erratum, by motion to dismiss, by pleading special matters in confession and avoidance, or by making an issue of fact by traversing the allegations." The People v. Green, 355 Ill. 468, 475. See also Harris v. Chicago House Wrecking Co., 314 Ill. 500. This court has followed this rule in The People v. Gardner, 279 Ill. App. 451, where we considered the claim that the petition stated no facts sufficient to warrant the court in vacating the judgment under the motion. We held that even if there was an entire lack of sufficient facts alleged in the petition, that question was not saved for review unless it was raised by one of the methods stated in The People v. Green, supra. We quoted from the Green case: "The petitions filed purported to state such errors in fact. Whether they did state errors sufficient to justify setting aside the judgment is a question of law, and if the State desired to present that question to this court it should have saved it by raising it in the trial court and securing a ruling thereon."

That procedure was not followed in the case at bar, hence the question of the sufficiency of the petition is not before us. This question not having been raised, the order of the Circuit court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39277

M. KOZAK, doing business as ADVANCE NEON COMPANY,
Appellee,

vs.

LERNER SHOPS OF ILLINOIS, Inc., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 625[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon trial by the court of an action in trover plaintiff had judgment for $275, from which defendant appeals.

Plaintiff alleged that defendant wrongfully converted to its own use an electric Neon sign, which is in the shape of the letter "T" - the top over five feet across, in height over sixteen feet, with the words, "Club Manhattan, Dine and Dance", with six transformers.

Earl Burgess was a tenant of the defendant of the second floor at 4038-40 West Madison street, Chicago; defendant's store was on the first floor; November 9, 1934, plaintiff sold to him the sign in question, agreeing to install and fix it outside the building, under a conditional sales contract wherein Burgess agreed to pay for the sign in monthly installments, the last falling due in March, 1935.

On or about January 3, 1935, Burgess was in arrears in his rent and abandoned the premises; he was also in default on his payments for the sign; the sign remained fixed to the outside wall of defendant's building until it was removed by defendant either in the latter part of June or in November, 1935. Defendant had leased the vacated premises to another tenant and the sign was removed at this time and placed, apparently, in an area way adjacent to defendant's building.

Although plaintiff knew that the sign was affixed to the

front of defendant's building for approximately eleven months he never made any demand upon the defendant for the sign nor claimed ownership of it until November 19, 1935; on this date plaintiff's truck called at defendant's store on West Madison street and the driver demanded of the young lady in charge the immediate delivery of the sign; he was referred to defendant's attorney, Myron Wisch. Plaintiff's attorney, David J. Zimring, telephoned to Wisch saying that he had a conditional sales contract and demanded the sign at once; this sales contract was not exhibited to defendant or its attorney until several months after this suit was commenced.

Both Zimring and Wisch, respective attorneys for the parties, testified, and there is direct conflict in their testimony as to what was said. Wisch seems to have suggested that since plaintiff had been so long in making any claim to the sign he might be estopped from asserting ownership, but also suggested that the matter could be settled without litigation and that if Zimring would submit his sales contract and evidence of ownership in the plaintiff, with a brief, this would be forwarded to the home office in New York City. Defendant has over two thousand stores in the United States, with headquarters in New York City. Zimring refused to accede to Wisch's suggestion, and on the same day, November 19th, mailed a letter to defendant at its West Madison street store demanding immediate return of the sign and the transformers; three days thereafter plaintiff instituted this suit. Benjamin Crane, an attorney associated with Wisch, testified that on the day suit was commenced he telephoned to Zimring, saying he had been authorized by defendant's home office to deliver the sign to plaintiff, but Zimring refused to accept this; Crane repeated that they wished to turn over the sign as defendant had no use for it, to which Zimring replied, "Too late now - I don't want it."

Upon the trial defendant's position was that it had a sign in its possession and was willing to give possession of it to the person entitled to it as the court might determine. Defendant's counsel stated that their position was that of an interpleader and that it claimed no interest in the sign.

Moreover, while there was evidence to the contrary, there was persuasive testimony by a well qualified witness that the sign had virtually no market value. One of the reasons was that the wording of the sign - "Club Manhattan, Dine and Dance," limited its desirability to a buyer who would wish a sign with those words, and that there was hardly one chance in a thousand of finding such a buyer.

We are of the opinion that this law suit has been caused by the contentious attitude of the respective attorneys in the case. If plaintiff had exhibited his conditional bill of sale to defendant's attorney and had been content to wait a few days, the sign would have been delivered to plaintiff without litigation. After no demand had been made upon defendant for nearly eleven months it might reasonably ask for time in which to investigate and ascertain whether the demand was made by one lawfully entitled to possession.

We hold that the defendant was not guilty of unlawfully converting the sign and transformers in question, hence the judgment should have been for the defendant.

The judgment is reversed without remanding.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

39368

68

EDWARD E. PLATH, Executor under the Last Will and Testament of Ida Plath, Deceased,
Plaintiff,

vs.

EDWARD G. DeLAUNTY et al.,
Defendants.

RICHARD M. O'BRIEN, Receiver,
Petitioner-Appellee,

vs.

RUTH HOFFMAN (Impleaded with, etc.),
Respondent-Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

289 I.A. 625

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Richard M. O'Brien, receiver in a foreclosure proceeding, filed a petition asking the court to order cancelled a lease of one of the apartments in the premises made by real estate agents to respondent Ruth Hoffman, presenting, among other reasons, that the lease ran beyond the statutory period of redemption; answers were filed and upon hearing the court held that the lease was void and ordered respondent and persons holding possession under her to vacate the premises; it was also ordered that moneys she had paid for rent and sums expended for moving expenses should be paid her; she appeals from this order.

May 31, 1935, O'Brien was appointed receiver in a proceeding to foreclose a trust deed "during the pendency of the foreclosure suit and the period of redemption"; he was also authorized to manage and control the premises, "subject to the orders of this court." The premises have been sold under a foreclosure decree and the period of redemption expired February 27, 1937.

In October, 1936, a written lease was executed by the respondent and the real estate agents of an apartment in the

building for a term expiring September 30, 1937; the receiver did not sign this lease and no order of court was obtained authorizing it; October 16th the receiver filed his petition disavowing the lease and the authority of the real estate agents who signed it; October 27th his amended petition was filed, in which he stated that he had not ratified or affirmed the lease, as it was made for a period of time extending beyond the expiration of the period of redemption; it was also alleged that the lease was obtained through misrepresentation and fraud.

Counsel for the receiver in this court suggest that as the period of redemption expired February 27, 1937, the questions presented on this appeal are merely moot questions. Respondent, however, argues that the receiver had authority to make a lease beyond the period of redemption.

The opinion in Chicago Land Bank v. McCambridge, 343 Ill. 456, disposes of this contention. In that case the trial court had authorized the lessee to enjoy the property for a period of four months after the master's deed issued. The Supreme court held that the court had no authority to make such a lease; that when the period of redemption had expired and the property was conveyed to the purchaser the jurisdiction of the court was exhausted. In Chicago Deposit Vault Co. v. McCulloch, 153 U. S. 554, 561, the receiver made a lease for a term which extended beyond the period of redemption; it was held that persons dealing with receivers do so at their peril and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court.

Cases cited by the respondent can be readily distinguished. Weeks et al. v. Weeks, 106 N. Y. 626, was an action for partition, and a receiver pendente lite was appointed; the case with the receiver was in court several years. It was held that the duration

of the litigation was uncertain and under the peculiar circumstances the court might authorize a lease extending beyond the litigation; but the court also said that ordinarily a lease which might extend beyond the termination of the litigation would be unjustifiable.

We find no opinion applicable to a simple case of foreclosure which holds that a receiver may make a valid lease extending beyond the period of redemption.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39249

67

CHARLES K. BUCKELS,
Appellee,

vs.

ARCOLE CONSTRUCTION COMPANY,
a Corporation, and JACK FITZGERALD,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

289 I.A. 626

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Charles K. Buckels brought suit against the Arcole Construction Company, a corporation, and Jack Fitzgerald to recover damages for personal injuries claimed to have been sustained by him through being struck and injured by one of the Construction company's automobiles driven by defendant Fitzgerald. There was a jury trial and a verdict in plaintiff's favor against both defendants for $20,000, which was later set aside and a new trial awarded. Afterward the case was retried and there was a verdict against both defendants for $10,000. The court required a remittitur of $3000. Judgment was entered on the verdict against defendants for $7000 and they appeal.

The record discloses that about 7:30 o'clock Sunday evening, April 21, 1935, plaintiff, a man about 26 years of age, was driving a Plymouth automobile south in the west lane of Skokie boulevard, about one-half mile north of Willow Road. His three sisters and another young lady were in the car with him. At this point he had a flat tire on the rear left wheel and drove his car so that the right wheels were on the shoulder, the left remaining on the pavement so that he could change the tire. He got out, jacked up the wheel, exchanged tires, which took about 20 minutes, and as he was finishing his work was struck and severely injured by a Chevrolet automobile belonging to defendant Construction company which was being driven south by its agent, defendant Fitzgerald.

Skokie boulevard for some distance in the vicinity of the

accident, is a straight, level road with a pavement 40 feet wide, having four traffic lanes, two for northbound and two for southbound traffic.

The place in question is in the country; there were no buildings or lights in the vicinity; it was somewhat dark at the time. Plaintiff and the left rear fender of his car were struck; plaintiff was thrown a considerable distance.

Fitzgerald testified that he was a watchman for the Construction company, and on the evening in question had been placing caution lights for some distance along the boulevard "where bridges were out to keep traffic out of them"; that he was traveling south about 30 miles an hour on the right or outer lane; that there was considerable traffic at the time; that the lights on the northbound automobiles were rather blinding; that he did not see plaintiff or his automobile until just about the time plaintiff was struck; that he did not strike plaintiff's car; that he went about 100 feet south of plaintiff's car and then turned back, and he and another man who was passing in an automobile and who had stopped, picked plaintiff up, put him in defendant's car and drove to the police station on the way to the hospital in Evanston; that a policeman at the station said, "Why, he is drunk." Witness denied this and said he had not been drinking except that he had some beer between two and four o'clock, - that he was not intoxicated; that the lights on his automobile were lighted as he was driving south on the boulevard.

Other witnesses who were in plaintiff's car testified that Fitzgerald was traveling from 35 to 45 miles an hour.

Plaintiff testified that his head lights and the tail light were burning prior to and at the time of the accident. The weather was clear and the pavement dry. Some of the witnesses testified that the shoulder, which was about 9 feet wide at the place in question, was soft, while other said it was solid or firm.

Plaintiff remained at the hospital five days, during all of which time he was in severe pain; he was treated by two physicians; after he left the Evanston hospital he was taken to the Jackson Park hospital and placed under the care of another physician; he remained at that hospital about three weeks, during all of which time he was in pain; he was taken home from the hospital and was there confined to his bed for the next two months, after which he got around on crutches for about a month, and after that used a cane for three or four weeks; he had dizzy spells and severe headaches, and at the time of the trial, June 1, 1936, more than a year after the accident, he was still under the doctor's care. He testified that "It was just turning dark when I stopped. It was dark when the accident happened."

A number of X-ray pictures are in the record. Dr. Christopher testified that on the evening of the accident he examined plaintiff at the Evanston hospital when X-rays were taken; that he found a fracture of the "head of the tibia" involving the spine of the tibia, a minor fracture of the sacrum and a minor fracture of the ilium; that he found bruises and abrasions and that plaintiff was in considerable pain; that they put a plaster cast on the right leg.

Dr. Cox testified that he treated plaintiff at the Jackson Park hospital and had continued to treat him to the date of the trial; that he found a "linear fracture of the right side of the sacrum, ***" a fracture of the tibia; that four bones in plaintiff's body were fractured; that he found lacerations and contusions and other injuries; that he placed a plaster cast around plaintiff's waist and down his right leg 6 inches below the knee, and that the injuries were permanent.

Defendants contend that plaintiff was guilty of contributory

negligence as a matter of law, and that the court should have directed a verdict in their favor as requested; that in any event, the finding of the jury that plaintiff was in the exercise of due care and caution for his own safety is against the manifest weight of the evidence. A number of cases are cited to the point that plaintiff was guilty of contributory negligence as a matter of law.

In Loutnan v. Chicago City Ry. Co., 198 Ill. App. 329, we said (p. 333): "As a general proposition, the question of contributory negligence is one of fact for the jury, and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Bale v. Chicago Junction Ry. Co., 259 Ill. 476."

In Kelly v. Chicago City Ry. Co., 283 Ill. 640, the court said (p. 645): "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In the instant case the evidence is to the effect that the accident occurred about 7:30 p. m.; that although it was dark at the time the night was clear, and one of the witnesses called by defendants testified he was driving south in the boulevard at the time in question and that he first saw plaintiff's car (which was after the accident) "when I was about a mile away. The weather was clear and the highway straight." The paved roadway was 40 feet wide with

four lanes for traffic; the road was straight and the country level.

There is further evidence that plaintiff's rear light was burning at the time, although there is some evidence from which it might be inferred that the light was obscured by the damaged automobile tire which was leaning against the car. When plaintiff found he had a flat tire he pulled to the right so that the two right wheels were on the shoulder. The evidence is in dispute as to whether the shoulder was solid. Plaintiff testified that he did not pull entirely off the pavement because he could not well use the jack to lift the wheel unless it was on the pavement.

The jury saw and heard the witnesses and was in a much better position (as was the trial Judge) to determine the truth of the matter in controversy than we are, in a court of review where we have but the printed page before us. The jury found in favor of the plaintiff, its finding was approved by the trial Judge, and we are of opinion that although the question of liability is exceedingly close, yet we think the question of whether the conduct of plaintiff at the time in question was "so violative of all rational standards of conduct" applicable to persons in similar circumstances, was for the jury; and we are also unable to say that the finding is against the manifest weight of the evidence.

Counsel for defendants further contend that on the trial of the case counsel for plaintiff made statements in his argument to the jury which were so improper, prejudicial and inflammatory as to require a reversal of the judgment, and although counsel for defendants say that most of their objections to such argument were sustained, yet this did not cure the error. It is also contended that plaintiff's counsel in his argument claimed that plaintiff had sustained certain injuries, of which there is no evidence, and that the judgment is excessive.

We have considered all of the contentions, and while we are

unable to approve of all that was said and done by counsel for plaintiff, yet we are of opinion that we would not be warranted in disturbing the judgment.

Upon a consideration of the entire record we are of opinion that defendants have had a fair trial and that the judgment is not excessive.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

39280

70

CATHERINE SCHULTZ,
Plaintiff-Appellant,

vs.

THE LIVE STOCK NATIONAL BANK OF CHICAGO, Administrator of the Estate of Max Grabo, Deceased,
Defendant-Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 626

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Catherine Schultz brought suit against Max Grabo to recover compensation for injuries which she claimed to have sustained in an automobile collision, as a result of Grabo's negligence. There was a verdict and judgment in defendant's favor. Plaintiff prosecuted an appeal to this court. Afterward Grabo died and the Live Stock National Bank of Chicago, as administrator of his estate, was substituted. The judgment was reversed and the cause remanded for erroneous instructions given at defendant's request. Schultz v. Live Stock National Bank of Chicago, 278 Ill. App. 623 (abst.) Afterward there was another trial and again the jury found defendant not guilty, and plaintiff prosecutes this appeal.

The record discloses that about 5:30 o'clock on the evening of December 27, 1931, as it was getting dark, plaintiff was riding as a passenger-guest in an automobile driven by Fred Brei west in Dempster street, and as they were crossing Waukegan road, a north and south street, there was a collision between the Brei car and an automobile driven by Grabo east in Dempster road as it turned to go north in Waukegan road. Brei's family was in the automobile with him, one of the children beside him on the front seat, his wife in the seat immediately behind him with their baby on her lap, and plaintiff opposite her - on the righthand side of the rear seat. There were "stop and go" lights at the intersection operated by a policeman stationed at the northeast corner of the intersection.

The evidence is to the effect that as Brei was some distance east of Waukegan road the lights changed to green, so that he continued across Waukegan road at about 25 miles an hour. There were four lanes of traffic in Dempster street; Brei was driving west in the second lane from the north; Grabo's car was coming east in the second lane from the south at a moderate speed. He turned his car to go north in Waukegan road at or near the west side of Waukegan road, and when it looked as though there would be a collision, Brei turned his car to the left or south and the right sides of the two cars brushed or sideswiped each other; Grabo's car just prior to the collision was traveling at a "moderate speed, very slow at the time." The two cars stopped at once and all the persons, including plaintiff, got out of the cars. The cars were then moved to the northwest corner of the intersection; plaintiff claimed she was injured, and she then took the names of some persons; afterward the two cars were driven away. Plaintiff refused to ride farther in the Brei car and went away in the car of another person.

Max Grabo having died prior to the second trial of the case, plaintiff was disqualified under the statute, so we do not have her version of the matter.

Andrew A. Gour, called by plaintiff, testified that he was a graduate of an osteopathic college in Chicago and licensed to practice osteopathy in Illinois in 1908, during which time he had practiced in Chicago; that he had known plaintiff about six years; that he first treated her on December 23, 1931, the day after the accident; that he found "a lumbar and hip condition. There was a bruise and a little swelling in the lumbar and slightly in the right hip, and the rest of the spine was very tense, so it was hard to treat;" that plaintiff told him of the automobile accident and he treated

her about a month and a half; that he found the "right hip slipped up in the back, the fifth lumbar rotated to the right and the second to the left;" that he gave her 21 treatments. On cross examination he testified he knew plaintiff about two years before the accident; that when he first knew her she was perfectly normal; that a year or so before the accident he saw her at his lectures; that he never examined her before December, 1931. Some of the testimony he gave on the former trial is in the record and what purports to be his office memorandum which indicates he first treated her on January 8, 1932.

The evidence further shows that no one was injured in the collision except plaintiff.

Dr. Warren, a practicing physician and surgeon, testified he first saw plaintiff February 19, 1932, and made a complete examination of her; she complained of severe pains in the lower back just above the hip, dizzy headaches, that she found great difficulty in rising from a sitting or reclining posture; that his examination revealed spasticity of the lumbar muscles in the lower back; that she was "markedly dizzy;" that in his examination he used a fluoroscope and thare were X-ray pictures of plaintiff. A number of those are in the record. He testified that the last time he treated her was the latter part of 1933; that he made another examination in 1935, and that when he first examined plaintiff the conditions he found "were the result of recent trauma."

Dr. Zeitlin, called by plaintiff, testified among other things, that he was a physician specializing in X-rays. A number of X-ray pictures were then shown him and he testified at considerable length and on re-cross examination said: "From the type of scoliosis I find in this film, my opinion is that it cannot be traumatic." He further testified that he knew nothing about plaintiff and that his information was based on the X-ray pictures.

There is further evidence in the record as to plaintiff's physical condition, some of which is to the effect that she was suffering from some of the same ailments for a considerable time prior to the accident; while on the other side, there was evidence that her health was good prior to the accident.

Counsel for plaintiff says the verdict is against the manifest weight of the evidence; that the evidence is "all one way" - that the cause of the collision was the negligence of Grabo. And after discussing the evidence he says, "Why did the jury bring in such a verdict in the face of this evidence? Was it because there was no evidence of injury to the plaintiff? The answer to this question is equally obvious from an examination of the record."

The evidence is to the effect that Brei was traveling at about 25 miles an hour across Waukegan road and that Grabo was coming east very slowly when he turned toward the north. The police officer testified that as Brei's car approached the Grabo car it slowed up and "when they came together it was just a brushing of the cars. *** They didn't move any further."

We think the question whether Brei or Grabo or both were to blame was for the jury. Whether the jury based its verdict on this question or whether it found that plaintiff was not injured, obviously we are unable to say. The case has been tried twice and two juries have found for the defendant. We feel we would not be warranted in disturbing the verdict, which has been approved by the trial Judge. We are also of opinion that the court should not have given, at defendant's request, the instruction complained of by counsel for plaintiff. By that instruction the jury was told that plaintiff was not relieved from the duty of exercising due care for her own safety because she was an invited guest, riding in the automobile, but was bound to exercise ordinary care and caution for her own safety, and that if the jury believed from the evidence that

plaintiff did not exercise such care, "or that she failed to use her senses and faculties to warn the driver of the automobile in which she was riding of approaching danger, and that her failure so to do under all the circumstances and conditions in evidence was negligence on her part which caused or proximately contributed to her injury, if you find she was injured, then the plaintiff cannot recover and you should find the defendant not guilty."

While it was plaintiff's duty to exercise due care and caution for her own safety, there was no evidence that she did not exercise such care. As stated in the opinion rendered in this case on the former appeal, "The only time that a passenger would be required to give a warning would be when he saw some danger which the driver did not see. If the driver sees an approaching automobile, and is watching it, then no warning is necessary." We went into this question fully in Hagen v. Dailus, 283 Ill. App. 249. While this instruction was erroneous and directed a verdict, we think the error was not such, in view of all the evidence in the case, as would warrant a reversal. The facts were not complicated but few and simple and easily understood. We think the instruction did not mislead the jury.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

39304

71

NEWMAN-RUDOLPH LITHOGRAPHING COMPANY, a Corporation, Appellant,

vs.

SHEPARD & LAWRENCE, INC., and CHILD DEVELOPMENT FOUNDATION, INC., a Corporation, Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 626

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover $1050, with interest thereon at 5% per annum from October 8, 1932. At the close of plaintiff's evidence there was a finding and judgment in defendants' favor and plaintiff appeals.

The record discloses that on October 8th and 10th, 1932, plaintiff entered into a written contract with Shepard & Lawrence, Inc., (hereinafter called the defendant) whereby plaintiff was to print and manufacture 15,000, 8-volume sets of books known as "Book Trails" for $10,500, and as part of the consideration plaintiff agreed to buy stock in the defendant company for 10% of the contract price at $10 a share. On October 8th plaintiff paid defendant $1050 for which it received 105 shares of defendant's stock, and plaintiff contends that afterward the Child Development Foundation, Inc., purchased all the assets of Shepard & Lawrence, Inc., and agreed to pay all of its liabilities.

Plaintiff contends that under the written contract of October 8, 1932, the defendant Shepard & Lawrence, Inc., was to thereafter notify plaintiff to proceed with the manufacture of the books; that no such order was given, and plaintiff after waiting a reasonable time tendered back the stock and demanded the $1050.

Plaintiff offered evidence to the effect that on October 8, 1932, it was given a written order for the books by Shepard & Law-

rence, Inc., and two days later a written supplement or memorandum of the order. These two documents are in evidence. The order of October 8 provides that plaintiff is to deliver the books when manufactured to Shepard & Lawrence, "as per later instructions." There is also in the record a contract entered into between Shepard & Lawrence, Inc., with Warren T. Davis, dated December 18, 1933, which contract was assigned by Davis to defendant Child Development Foundation, Inc. It recites that Shepard & Lawrence, Inc., is engaged in the publication and sale of a set of books known as "Book Trails" and that all its property, which it is selling to Davis, is free from incumbrances and liens, "except possible claims of creditors for current and contingent liabilities." The contract further provides that Davis is to organize a corporation with a capital of $150,000, and that Shepard & Lawrence, Inc., agrees to subscribe for an amount of preferred stock in the company equivalent to the present paid-in capitalization of Shepard & Lawrence, Inc.; that Shepard & Lawrence, Inc., was to turn over to Davis all its property, including all of its accounts receivable, title to plates and paintings, art work, and copyrights of "Book Trails", etc. The buyer agrees to collect the accounts, deduct 15% as a collection fee, pay any legal claims which may arise against the receipts and "$1000 a month to Seller until $10,000 has been turned over for the payment of Seller's current liabilities;" that additional sums are to be deposited with the Northern Trust Co., "as a special reserve fund for the payment of Seller's contingent liabilities and the cost including attorneys' fees, for settling the same or defending any suit that may be brought against the Seller to establish the same."

At the close of plaintiff's evidence the court, on its own motion, held that plaintiff had not made out a case and entered

judgment accordingly. In rendering his decision the court said, "There is nothing in this case. You haven't shown anything. You have got an ambiguous contract, no time fixed, indefinite. You kept the stock. What you should have done, if you had any claim against this corporation, it was your business within a reasonable time to insist that they give you this order, and on their failure to give you the order you should have demanded back your money. *** You have slept on your rights. Now you come in on a contract that is indefinite absolutely and in a measure ambiguous, and contend that you are entitled to your money back, when as a matter of fact you never demanded that they should give you this order."

The order or contract of October 8th expressly provides that plaintiff was to proceed with the manufacture of the books when defendant gave it orders to do so. The contract provides that plaintiff was to manufacture the books "as per later instructions" (which were to be given by Shepard & Lawrence, Inc.), and no time being mentioned, the law presumes a reasonable time thereafter.

Plaintiff in its complaint alleged that it was at all times ready, able and willing to manufacture the books when so ordered by Shepard & Lawrence, but that Shepard & Lawrence "refused to give to plaintiff the later instructions required by said order." Shepard & Lawrence, Inc., in its answer admitted the making of the contract, the payment of the $1050 to it by plaintiff for the 105 shares of stock, but denied that plaintiff was ready, able and willing to manufacture and deliver the books for the price named in the contract, but alleged that on the contrary plaintiff told it prior to starting the suit that it would not manufacture the books for the price set forth in the contract; that at the time of the execution of the contract of October 8th and 10th, plaintiff was advised that before the 5th edition of the books (which was the edition mentioned in the contract) could be printed or required by

order

Shepard & Lawrence it would be necessary for Shepard & Lawrence to sell the balance of the 4th edition of the books and therefore it might be "many months before the defendant would require and need and therefore give instructions for printing any part or portion of the fifth edition," and that at the time plaintiff told defendant it would not print and deliver the books at the price named in the contract, defendant told plaintiff it had an adequate supply of the 4th edition to take care of the demand for the books. Defendant further alleged that the Child Development Foundation, Inc., did not purchase all of the assets of Shepard & Lawrence and did not agree to pay the liabilities of Shepard & Lawrence, Inc.

Where a contract fixes no time within which the work is to be done the law will imply a reasonable time, and what is a reasonable time depends upon the circumstances of the particular case. In re Hellams, 223 Fed. 460; Williston on Sales, 2nd ed., sec. 457; Hamilton v. Scully, 118 Ill. 192.

Since the contract of October 8th did not specify the time within which plaintiff was to manufacture the books (but was to do so when later requested by Shepard & Lawrence) the law will presume (Shepard & Lawrence having given no such instructions) that they should have been given within a reasonable time; that Shepard & Lawrence, Inc., construed the contract as requiring it to give plaintiff instructions when to proceed with the work is shown by its answer, from which we have above quoted, because it alleges that it had a part of the 4th edition on hand and would not require the manufacture of the 5th edition by plaintiff, and therefore would not "require and need" to give plaintiff instructions until it needed the 5th edition.

In the instant case the contract for the books is dated October 8, 1932; the suit was begun August 11, 1934; the case was tried October 6, 1936. Since only plaintiff's evidence is in the

record, we are of opinion that Shepard & Lawrence did not give plaintiff instructions to commence the manufacture of the books within a reasonable time. We are also of opinion that plaintiff, by tendering back the stock certificate for the 105 shares of stock, was entitled to have the $1050 returned, and it was not necessary, under the facts disclosed by the evidence, for plaintiff to have made a demand before bringing suit. It is obvious that the demand would have been unavailing, and the law never requires the doing of a useless act. Nat. Bond & Investment Co. v. Zakos, 230 Ill. App. 608; Cranz v. Kroger, 22 Ill. 74; Kee & Chapell Co. v. Penn. Co., 291 Ill. 24[illegible]. Plaintiff made a prima facie case against both defendants, and the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

proper judgment. The attorney for appellant afterwards wrote a letter to the clerk of the Circuit Court in which he related the conversation above mentioned, stated that he agreed with the attorney for appellee that there was no sufficient judgment, etc., and that the clerk might show his letter to the judge. Attorney for appellant did not appear in court on January 15th, 1935, and upon the case being called the trial court dismissed the case for want of prosecution. No appeal was taken therefrom and no action of any kind at the term at which it was entered, nor the following March Term, but in the May Term, 1935, appellant appeared with a different lawyer and filed his motion to set aside the order of dismissal. The Court denied this motion, as above stated.

This appeal challenges the right of the trial court to dismiss the cause in the first instance. In Hague vs. King et al 245 Ill. App., speaking through Mr. Justice Higbee, we held that "An appeal from a judgment of a justice of the peace which simply amounted to a finding gives the County Court no jurisdiction and it should sustain a motion to dismiss the case." What the court can do on motion of a party it can do on its own motion. It must necessarilly be so; also when cases get onto court dockets, although it is apparent on their faces that the court has no jurisdiction to hear them, they must remain there forever because the court is powerless to dismiss them.

In addition to the power of the court to dismiss for want of jurisdiction in this case, the court had a virtual agreement of the parties that the case should be dismissed.

The dismissal by the court was a final appealable order from which Appellant did not appeal, instead he waited three terms and made the motion to reinstate the denial of which he now complains about. We are of the opinion that

no proper diligence was shown in prosecuting this matter which would entitle Appellant to the right to have a motion to reinstate the cause allowed even were it otherwise meritorious. In our judgment the trial court properly denied this motion and its judgment in that regard is hereby affirmed.

JUDGMENT AFFIRMED.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1956.

Term No. 20 Agenda No. 22

MARY C. GASS MUELLER, Petitioner-Appellee,	
vs.	APPEAL FROM THE COUNTY COURT, ST. CLAIR COUNTY, ILLINOIS.
EDWARD J. CRUSE, Appellant.	

289 I.A. 627

Murphy, J:

In 1928 appellant received a deed to a tract of land consisting of 40 acres located in St. Clair County. Subsequently two deeds claimed to be spurious were filed of record and in 1955 appellant filed a bill to remove them as clouds on his title. Appellee was not named as a party in either deed but was made a party defendant to appellant's suit and appeared and filed an answer and crossbill claiming to be the owner of the land. While this suit was pending the Department of Public Works and Buildings filed a petition in the County Court to condemn a right of way for a state road across the land in question. Appellant and appellee were made defendants to the eminent domain proceeding and by reason of the dispute as to ownership of the land and the litigation pending, the damages that were awarded were ordered paid into the County Treasury. Subsequent to the deposit of the fund with the County Treasurer the suit to quiet title proceeded to a final decree. On September 6, 1955 a decree

was entered dismissing appellee's crossbill and decreed the title to the 40 acre tract and other land to be in appellant. Appellee filed a notice of appeal to the Supreme Court, furnished proof of service of notice, and filed a bond so that the appeal would act as a supersedas. December 30, 1935 while the appeal was pending and before the record had been filed in the Supreme Court, parties agreed on a settlement and executed a release under seal. No reference was made in the release agreement to the money on deposit with the County Treasurer. Subsequent to the execution of the release, appellee petitioned the County Court to pay the condemnation fund to her. Appellant claimed it and the County Court entered an order directing the money to be paid to Appellee. This appeal is from that order.

The question raised on this appeal makes it necessary to consider the release agreement and to determine whether or not that agreement included the dispute between the parties over the fund then on deposit with the treasurer.

The release after giving the names of the parties and their respective residences, recites that "Whereas there had been divers dealings and transactions between the said Edward J. Cruse, Eleanor Cruse, his wife, and Mary C. Gass Mueller, with reference to their business and otherwise and certain disputes and differences have arisen between them. The second paragraph recites that the parties "Have agreed to settle all of the said disputes and differences now existing between them by the payment of the sum of $5,000. by the said Mary C. Gass Mueller to the said Edward J. Cruse and Eleanor Cruse, his wife, and by the execution of mutual releases in the manner hereinafter set forth." The release then provides that in consideration of $5,000. the receipt of which is acknowledged: "Each of the parties hereto does hereby release the other, his

or her heirs, executors, administrators and assigns from all debts, accounts, claims, demands, damages, actions, causes of action, suits and controversies, of any kind or nature whatsoever, for or by reason of any matter, cause or thing from the beginning of the world up to the date hereof, and particularly all suits now pending in any of the courts of St. Clair County, Illinois, or the City of St. Louis, Missouri, wherein the parties hereto, or any of them, are parties plaintiff or defendant, and which involve matters in controversy between the parties hereto or any of them." The further provision was that each party was to pay their own attorney fee, that all suits should be dismissed including appellee's appeal to the Supreme Court and that appellant and his wife should convey by quitclaim deed all their title and interest in all land involved in the litigation to appellee. A supplemental release was drawn excepting certain specified items of personal property which were then in the position of appellee but which were to be delivered to appellant.

If the title to property condemned is in litigation in a pending chancery suit it is proper to order the money paid into the hands of the county treasurer to abide the result of the chancery suit. Eddleman vs. Union County Transaction Co. 217 Ill. 409. If the property is taken for public use the compensation money is deemed a substitute for the property taken. City of Chicago vs. Gage 268 Ill. 232.

It is evident that when the money awarded in the condemnation suit was paid to the county treasurer there was sharp dispute between appellant and appellee as to its ownership. It must be assumed that the words in the release, "Certain

disputes and differences have arisen between them" were used by the parties as intending to include the dispute over this fund. It would follow that in the second recital where they agreed to settle all of the said disputes and differences that it was intended to include the dispute over this fund. In the release they agreed to include all debts, accounts, claims, demands, damages, actions, causes of actions, suits and controversies, of any kind or nature whatsoever, for or by reason of any matter, cause or thing from the beginning of the world up to the date hereof. In consideration of this settlement appellee was to pay $5,000. to appellant and to receive from appellant a deed for his interest in the property involved in litigation.

Appellant contends that where general language purporting to release all claims is used and included in the release are certain specified items, that the release shall be construed as limited to the specific items only.

In Crum vs. Sawyer 132 Ill. 445, 464 the court said: "Here the general and comprehensive expression comes first. It is that the party of the first part does 'release....all right and interest of every kind and nature whatsoever, and especially his contingent right of dower and homestead,' etc., in the lands of his wife. The larger and more general intent is first stated...An intent thus expressed will not be defeated or limited by subsequent expressions more restricted in their application." The same rule was followed in Chicago Union Traction Co. vs. O'Connell 224 Ill. 428; Brumage vs. Gottschalk, 205 Ill. App. 260.

It is our conclusion that the trial court correctly construed the release as including the adjustment of the dispute between the parties as to this deposit fund and that it was intended that appellee should have all the property including the deposit in question upon the payment of $5,000.

The judgment is affirmed.

Judgment Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Oct TERM, 1936.

Term No. 35 Agenda No. 23

THE CITY OF ELDORADO, a Municipal Corporation, et al., Appellees, vs. THE ELDORADO WATER COMPANY, a Corporation, Appellant.	APPEAL FROM THE CIRCUIT COURT OF SALINE COUNTY, ILLINOIS.

289 I.A. 627

Murphy, J:

The City of Eldorado and 54 other plaintiffs filed a suit in the Circuit Court of Saline County against the Eldorado Water Company. A temporary injunction was issued enjoining the defendant from discontinuing water to any consumer and ordering water service reestablished to all consumers wherein their source of supply has been indiscriminately discontinued. The action was based on a violation of contract, impurity of water, and failure to observe the rulings of the Commerce Commission. Answer was filed with a motion to dissolve the temporary injunction. Affidavits were filed in support of the motion. On August 12, 1935 the motion to dissolve was denied as to the City of Eldorado, Eldorado School District No. 67 and F. B. Pierce doing business with Eldorado Hospital and as to all other plaintiffs the temporary injunction was dissolved for want of equity. Seven days thereafter a supplementary decree was entered and was stated to be for the purpose of clarifying the decree of August 12. On August 12, 1935 defendant filed

suggestion of damage.

The matter came on for a final hearing upon evidence and on December 2, 1935 a final decree was entered finding that the water furnished prior to the temporary injunction was not reasonably pure and was unfit for general use, that the defendant threatened to discontinue the water to users not paying in full prior to the issuance of the temporary writ, that the temporary injunction was properly issued, that the defendant has constructed a new filtration plant, that the water is now of good quality and that the grounds for injunction have been removed, that no damages had accrued to the defendant and that therefore no evidence was heard on the suggestion of damages, ordered that the temporary injunction and modification thereof be dissolved and that the defendant may not shut off water service to delinquent users because they owe for any water furnished between November 1, 1934 and August 31, 1935. Defendant appealed from that decree and asks this court to reverse the trial court, dissolve the injunction and remand the cause only for the purpose of a hearing to assess defendant's damages. Appellees have not filed any brief and under the practice of this court where an appellee does not appear and file a brief the decree is reversed pro forma.

The order of this court will be that the decree of the lower court is reversed and the cause remanded with directions to dissolve the temporary injunction and modifications thereof as to all plaintiffs and that the injunction shall not be continued against the defendant as to any delinquent customers who used water between November 1, 1934, and August 31, 1935 and who have not been paid for same, and that the court may hear and determine defendant's right to damages and the amount thereof.

Reversed remanded with directions.

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Date	Name		
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	111 W. Monroe St		
9-8-80	TOM OAL COMPO	726-5700	
10/6/80	M. Toolan	641-3100	
11/7/80	Ft Aid	782 1905	
6/11/81	K Mulgrim	33-1	3029

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